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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

AT THE OCTOBER TERM, 1896, OF THE FIRST DISTRICT, AND THE MAY
TERM, 1896, OF THE THIRD DISTRICT.

VOL. LXVII.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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THE APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.

ARBA N. WATERMAN, “ “ “

HENRY M. SHEPARD, “ “ “

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

JUSTICES.

LYMAN LACEY, Havana, Mason county.

OLIVER A. HARKER, Carbondale, Jackson county.

JOHN D. CRABTREE, Oregon, Ogle county.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield, Sangamon county.

JUSTICES.

GEORGE W. PLEASANTS, Rock Island, Rock Island county.

GEORGE W. WALL, Du Quoin, Perry county.

CARROLL C. BOGGS, Fairfield, Wayne county.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Frank W. Havill, Mount Vernon, Jefferson county.

JUSTICES.

NATHANIEL W. GREEN, Pekin, Tazewell county.

CHARLES J. SCOFIELD, Carthage, Hancock county.

ALFRED SAMPLE, Paxton, Ford county.

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FIRST DISTRICT—OCTOBER TERM, 1896.

Albert J. Stone v. Albert S. Tyler et al.

1. **MECHANIC'S LIENS—*Scope of Decree.***—Where property, which is subject to a mechanic's lien, has been sold under a prior mortgage, it is proper to render a decree against the defendant for the amount due, to order execution thereon, and also to direct the property involved to be sold under such decree in case it is redeemed from the mortgage sale.

2. **SAME—*When Receiver will be Appointed.***—Where property, which has been held to be subject to a mechanic's lien, has been sold under a prior mortgage, and the defendant has no property out of which an execution can be satisfied, it is proper to appoint a receiver for the property involved for the benefit of the holder of the mechanic's lien.

Mechanic's Lien.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

FRANK J. CRAWFORD and C. D. F. SMITH, attorneys for appellant.

EDWARD J. WALSH, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. Since this case was here upon appeal from an interlocutory decree—63 Ill. App. 418—a final decree has been entered in favor of the appellees for \$3,401.66, declaring and directing that “petitioners herein have and are hereby decreed a mechanic's lien upon whatever interest appellant

now has in and to said real estate and building superior to all liens and claims, except said Northwestern Life Insurance Company acquired under such sale of E. B. Sherman, master, on December 4, 1895, execution not to issue for the sale of the present interest of appellant unless he should, within the time allowed by law, redeem said real estate and building from said sale so made December 4, 1895, as provided by law, and, in that case, unless appellant shall before that time pay, or cause to be paid, amount decreed to be due petitioners from him, said master, or some other master, shall proceed to sell the said real estate and building to satisfy such amount, sale to be in accordance with statute governing sales of real estate on execution by sheriffs; that the master shall make report to the court of such sale, and shall, out of proceeds of any such sale, pay costs, master's fee, and amount due petitioners under this decree, and deposit balance, if any, in court."

The decree continues the receiver, and provides further, that unless appellant "shall pay, or cause to be paid within ten days, from the date of this decree, to petitioners herein, or their solicitor, the said sum of \$3,401.66, together with interest thereon at the rate of five per cent per annum from the date of the entry of this decree, and costs of this proceeding, including \$142.50 paid the master herein for his fees, that execution issue against the said Albert J. Stone in favor of petitioners herein, for the amount of this decree, with interest and costs, less whatever may have been paid before that time by the receiver herein to petitioners, under this decree, as hereinabove provided."

The premises having been sold under the mortgage, it is contended by the appellant that there could be no decree thereafter to enforce the lien. Possibly the appellant may redeem; then the decree could be enforced. If he does not redeem, may not this decree give the appellees a right to redeem after the appellant's twelve months have expired? *Whitehead v. Hall*, 148 Ill. 253.

Such decree is in accordance with Sec. 2 of the "Act to

Stone v. Tyler.

revise the law in relation to liens," of March 25, 1874, in force when the lien in this case accrued, as well as section 1 of the present law, act of June 26, 1895, though the sale already had under the foreclosure prevents a compliance with Sec. 21 of the former act, and Sec. 19 of the present act. *Kell v. Worden*, 110 Ill. 310.

We hold that the sale under the mortgage did not prevent a decree for the appellees.

Sec. 25 of the former act, as well as Sec. 20 of the present act, by providing that execution may issue for any deficiency, imply that the decree will be personal as well as of foreclosure, upon which decree the net proceeds of the sale will be credited. When a sale in accordance with the letter of those sections is prevented by the sale of the premises under a prior lien, it is within the equity of those sections that an execution shall issue for the whole decree. Suppose that in the suit to foreclose the prior mortgage, the appellees had been made defendants, and they had filed their cross-bill or petition, and the decree had been for the mortgagees in the prior mortgage, fixing the amount, next for the appellees here, fixing the amount, and directing a sale, and the application of the proceeds, first in the mortgage, and next to the decree in favor of the appellees. In such case, would not the whole decree in favor of the appellees have been a deficiency, if the proceeds only satisfied the mortgage?

If that be so, what difference does it make in a court of chancery whether the same result is reached in one suit or two?

The objection to that feature of the decree is not valid.

The real contest between these parties is upon the receivership.

The former law did not make any provision for a receiver; the present law does. (Sec. 12.) Whether, as the proceedings under the former law were chancery proceedings (*Paddock v. Stout*, 121 Ill. 257), the court might appoint a receiver, need not be discussed. The provision for a receiver in the present law, relates wholly to the

remedy. Remedies, even in suits pending when a new law relating to them takes effect, are governed by such law. *Templeton v. Horne*, 82 Ill. 491.

The circumstances here justified the appointment of a receiver. The security upon the premises was practically gone. Nothing could be collected upon execution against the appellant. The rents issued out of property from which, as against the appellant, the appellees had the superior right to have satisfaction. What equity is there in permitting him to enjoy the rents while they get nothing? *Clark v. Logan, etc.*, 58 Ill. App. 311; *Haas v. Chicago Bldg. Society*, 89 Ill. 498.

The whole decree is affirmed.

67 20
171s 480

Louis A. Coquard v. The National Linseed Oil Company.

1. APPELLATE COURT PRACTICE—*Abstract Must Show Error Com-
plained of.*—The facts which are relied upon to maintain a suit must be pleaded, and upon appeal must be set out in the abstract, and the Appellate Court will not undertake to supply, from an exceedingly voluminous record, matters which counsel seem to have been unable to find in it, or are unwilling to present as required by the rules of the court.

Bill, to wind up a corporation. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

FRANKLIN A. McCONAUGHY, attorney for appellant.

WILLIAM W. GURLEY and HORACE G. STONE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Appellant's amended bill was demurred to, and was dismissed for want of equity, and this appeal has ensued.

The appellant alleged that he was the owner of 300 shares in the appellee corporation, purchased by him at different times, viz.: 150 shares on June 15, 1889, 50 shares

on December 6, 1889, and 100 shares on December 14, 1893, of which shares 150 stand in his own name, and 150 shares in the name of his clerk, upon the books of the corporation.

It is alleged that the capital stock of the appellee corporation is \$18,000,000, consisting of 180,000 shares. Appellant's interest in the corporation is, therefore, equal to one-sixth of one per cent.

The prayer of appellant is, in substance, for a discovery of the affairs and condition of the corporation, for the appointment of a receiver of its property, and for a winding up of its business and a distribution of its assets.

Concerning such property the bill, as we understand, alleges it to consist of the assets of the National Linseed Oil Trust, and of numerous other corporations absorbed or purchased by the appellee, and paid for in the stock of the appellee of a face value greatly above its real value, and all combined into one corporation under the name of the appellee, with a capital far in excess of the values of the properties so acquired and held by it.

It is impossible to ascertain from appellant's brief just what is complained of.

We make some extracts from the brief which come the nearest to affording us any aid in ascertaining what it is that appellant relies upon, as ground for the interference of a court of equity at the suit of a shareholder.

“ This case comes before the court with all the allegations of the bill admitted. It is therefore admitted that the defendant corporation is simply the successor of the National Linseed Oil Trust; that the National Linseed Oil Trust was a trust, pure and simple, organized on precisely the same lines as the other great trusts of the country. * * * It is most earnestly insisted here by counsel, that the trust character of the defendant corporation being admitted by the pleadings, and by the express declaration of its legal head, what is a trust and a monopoly with the rules and definitions at common law, and those set out in our recent statutes above referred to, this without anything else, compels the interference of the chancery court, under its general

equity power and under the 25th section of the general incorporation act. It seems to be perfectly clear, as clear and as positive as the English language can make it, that there are two provisions of this section of the statute which justify, and compel the interference of the court. * * *

Again the corporation has in contemplation of law 'ceased doing business,' unless we will presume that notwithstanding the decisions of our courts, and the enactment of our statutes, the unlawful business will be continued in defiance of both; nor can we close our eyes to the effect—the inevitable effect—of allowing this business to continue, one of the disastrous consequences of which be considered. The corporation in its statement shows a large and growing item of bills receivable, etc. It amounts now to nearly two and one-half million dollars. Under our statutes and the construction given them by this court, this is entirely uncollectible—means disaster to all concerned, and the longer the corporation continues and the larger this item grows, the greater the disaster. * * * But this is by no means all. On examining transcript of the record in this case the court will see that nearly all of the provisions of the statute under which this corporation is manifested have been disregarded or violated, as well as provisions of law outside of the statutes of the State. * * *

The last quotation of the stock is fifteen cents on the dollar, and this can not and will not be denied.

The court below should have overruled the demurrer to the bill and decreed the relief asked. It should have compelled a discovery by the officers of the company, enjoined the illegal practices of the company, and placed it in the hands of a receiver. If, as we have endeavored to show, it is doing no legitimate business, then in contemplation of law it has ceased to do business, as no court will recognize that as a business, which, both at common law is made lawful, and by express provision of statute, and practically made impossible. *Nemo potest nisi quod de jure potest.* The language of the statute does not contemplate a necessity to wait until the State has forfeited the franchise. It declares that when it, or its agents 'do, or refrain from doing

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any act which shall subject it to a forfeiture of its charter or corporate powers, * * * courts of equity shall have full power * * * to appoint a receiver,' etc. It is of the greatest importance to the *bona fide* stockholders that the wrecking shall stop; that the growth of the uncollectible bills receivable shall stop; that the corporation be put in liquidation, so that these stockholders may know the extent of, and properly meet, the disaster which has overtaken their investments."

An examination of the bill as set out in the abstract, reveals nothing much more satisfactory in determining what it is that is complained of, upon which to apply any principle of law. Much is said about trusts and their invalidity, but whether a trust exists, or, if one exists, what consequences follow, must be made to appear from facts pleaded, and such facts as are relied upon should be set out in the abstract.

With so little aid, we will not undertake to supply from an exceedingly voluminous bill, matters which counsel seems to have been unable to find in it, or unwilling to present to us as required by the rules of the court.

The appellant seems to expect that this court will find reasons for conclusions which he states, but for which he could not himself discover the grounds.

The appellant alleges himself to be a dealer in stocks and bonds, and to have been such for more than twenty years, and so near as we can make out from the abstract, the principle purchases of oil mill properties of which he complains, were made by the appellee in February, March and April, 1890, which was six years before his amended bill was filed, and about a year after he became a stockholder.

What we said in *Levin v. Chicago Gas Light and Coke Co.*, 64 Ill. App. 393, about participation in alleged illegal conduct, and *laches* by shareholders under somewhat similar circumstances, has application here.

We do not see that appellant has made out for himself a case for equitable interposition, and therefore affirm the decree of the Circuit Court, dismissing his bill for want of equity.

Leverett B. Sidway, Henry T. Sidway and George M.
Bogue v. The American Mortgage Com-
pany of Scotland.

1. APPEALS—*From Interlocutory Orders.*—The prayer for and allowance of an appeal from an interlocutory order granting an injunction and appointing a receiver are unnecessary and wholly nugatory. The court has nothing to do with appeals from interlocutory orders.

2. SAME—*From Interlocutory Orders—What they Include.*—Where an order was issued enjoining defendants from collecting notes in their hands belonging to the plaintiff upon which they claimed a lien, and an appeal bond filed by defendants recited an appeal from an order appointing a receiver for the property but said nothing in regard to the injunction, *it was held* that the defendants had acquiesced in the injunction, which prevented them from caring for their own interests or those of the plaintiff in the property, and that under these circumstances the appointment of a receiver was proper.

Bill, for an accounting, an injunction and a receiver. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

ALDRICH, REED, FOSTER & ALLEN, attorneys for appellants L. B. and H. T. Sidway; HAMILTON B. BOGUE, JR., attorney for appellant George M. Bogue.

QUIGG & BENTLEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. July 30, 1896, the court entered in this cause an interlocutory order, a part of which is as follows:

“It is further ordered that the motion of defendants for a dissolution of the restraining order heretofore granted in this cause, be, and the same is hereby overruled, and said restraining order is continued as an injunction until the further order of this court.”

That restraining order appears to have been an order indorsed upon the bill of the appellee as follows:

“To the Clerk of the Circuit Court of Cook County, Illinois:

Sidway v. American Mortgage Co. of Scotland.

Let the writ of injunction issue pursuant to the prayer of the foregoing bill of complaint upon the filing by complainant of an injunction bond in the penal sum of \$1,000, with surety thereon to be approved by the clerk of this court.

O. H. HORTON, Judge."

That order was followed by a formal writ of injunction, *inter alia*, restraining the appellants from "selling, incumbering or otherwise disposing of any books, papers, moneys or other property of any nature or kind to which, or to the benefit of which the 'appellee' is equitably entitled."

Another part of the order of July 30, 1896, was as follows:

"Now, therefore, it is ordered and decreed that Arthur Young, of the city of Chicago, county of Cook and State of Illinois, be and is hereby appointed receiver of all the papers, books, moneys and other property aforesaid, which were, at the date of the filing of the bill of complaint herein, within the possession or control of the defendants herein, and that said receiver collect in and hold all moneys due, or hereafter becoming due, on account of any such property, and manage and control such property and deal with the same according to the further order of this court, and generally have and exercise in the premises the usual powers and functions of a receiver in chancery.

And it is further ordered and decreed that the defendants herein, Leverett B. Sidway and H. T. Sidway, upon the entry of this order, and the service of a copy thereof upon them, immediately surrender and deliver over the possession, control and custody of all the aforesaid papers, books, money and other property to which, or to the benefit of which, the complainant herein may be beneficially entitled."

The record of July 30, 1896, containing those orders, closes as follows:

"And thereupon the defendants pray an appeal from the foregoing order appointing a receiver and also from the order continuing said restraining order as aforesaid, which

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appeal is allowed upon condition that defendants file their appeal bond, to be approved by the clerk of this court, in the penal sum of two hundred and fifty (250) dollars, conditioned according to law within twenty (20) days from and after the date of the entry of this order."

This prayer and allowance of an appeal are wholly nugatory. The court has nothing to do with appeals from interlocutory orders. This is fully treated in *Alles Plumbing Co. v. Alles*, No. 6443, filed November 5, 1896.

August 3, 1896, Leverett B. Sidway, one of the three defendants in the bill, did file with the clerk of the Circuit Court a bond which the clerk approved, reciting an appeal by said Leverett B. from a judgment against him, "wherein a receiver was appointed of certain effects in his possession belonging to said company," so that, as to him, there is an appeal from the order appointing a receiver. There is no appeal that touches the injunction, and it is now too late to effect one. It can not be taken before the clerk for the thirty days in which it might have been taken have expired; it can not be done here by amendment, for there is nothing here relating to any such appeal, to be amended. *Tedrick v. Wells*, 152 Ill. 214.

The bill herein was filed by the appellee, whose business for many years has been lending money upon mortgage securities in the United States. The appellants have been the agents of the company, and as such, have in their hands securities taken for such loans, and other assets belonging to said company. A dispute has arisen between the parties as to which is indebted to the other, and the only claim the defendants below made to the possession of the assets in controversy was, that they had a lien upon those assets for the balance due to the defendants. If they have such lien, it is preserved by a part of the order not quoted.

Money becoming due on the securities can not be collected without surrender of the securities.

It is necessary that somebody should have the power to so collect and surrender.

The defendants below have submitted to an injunction

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which prevents them from so collecting and surrendering. Such submission waives all objection to the injunction, so that it is not now a pertinent question whether any valid objection to it ever existed. It stands as a rightful exercise of the jurisdiction of the Circuit Court.

Then it follows, of course, that as the defendants below can not take care of the interests of the complainants, the court should put in a receiver who can.

Errors are assigned on the record here by all three of the defendants below upon the orders as to both injunction and receiver. Nothing as to the injunction is before us, and whether an assignment of error as to the receiver, joined in by two who did not appeal, is available for the one who did, is a question which we need not consider; but it would seem that as an assignment of error in this court stands in the place of a declaration below (*Lang v. Max*, 50 Ill. App. 465), such a misjoinder would be fatal. 2 Ency. Pl. & Pr. 933.

We affirm the order appointing a receiver, because in the condition to which the case has got below, a receiver is necessary.

The appellee will recover costs here.

William J. Lehigh v. World's Columbian Exposition.

1. FELLOW-SERVANTS—*A Question of Fact.*—It is for the jury to determine, under correct instructions defining what in law constitutes the relationship of fellow-servants, the question of fact, whether in a particular case the relationship exists or not.

2. PRACTICE—*When the Court Should Take a Case from the Jury.*—Unless the evidence given at the trial with all inferences which the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such verdict, if returned, must be set aside, the case should be submitted to the jury; and it is only where there is no evidence before the jury on a material issue in favor of the party holding the affirmative of that issue, on which the jury could, under the law, reasonably find in favor of such party, that the court may properly exclude the evidence or instruct the jury to find against him.

67	27
75	165

67	27
76	601

67	27
894	488

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed November 19, 1896.

J. WARREN PEASE, attorney for appellant.

JOHN A. POST and JOHN B. BRADY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee, in case, to recover for personal injuries suffered by him through the negligence of appellee, by its servants. Upon the conclusion of the evidence in behalf of the appellant, the court sustained a motion by appellee to instruct the jury to find the defendant not guilty, which being done and a verdict accordingly returned, judgment was given against the appellant.

The sole question is, was there enough evidence in the case to require the question whether the appellant and the other servant of appellee, through whose act the accident occurred, were fellow-servants, to be submitted to the jury?

On January 7, 1893, and for five months previous, the appellant was in the service of appellee as a painter and calciminer, and at the time of, and for several weeks before the accident, worked in the Manufactures Building, doing what is called scaffold work, that is, painting or calcimining from a scaffold. There were thirty-five scaffolds suspended in the building. The scaffolds were from twenty to twenty-six feet long, and the gang that worked on each scaffold consisted usually of three men who always worked together, not necessarily, as we understand, upon the same scaffold, but always together upon some one scaffold.

The whole force was under one foreman, and all worked to a common end, viz., the general enterprise of painting and calcimining the interior of the building. Each man had his separate pail, brush, etc. All did the same kind of work and were paid the same wages. All the scaffolds were hung by sailors, and were hung exactly in the same

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way, and after being hung the painters took charge of them, that is, each gang of painters took charge of one scaffold, until it became necessary to rehang the scaffold in another place, and shifted or lowered it as their work progressed.

The scaffolds were so hung that the "stretch" painted by one gang would meet or be coterminous with that painted by the gang on the next nearest scaffold. The "stretch" that could be reached and painted by one gang was practically equal to that which every other gang could cover, and if each gang worked with the same rapidity as every other one, all the scaffolds would be lowered or shifted at the same time. That result was not, however, the case, and sometimes one scaffold would be lowered in advance of others.

Each scaffold was suspended by ropes and tackle from an overstretching beam or girder that supported the roof, and was lowered or shifted by loosening a heavy rope, called a penant, which passed over, or through, the supporting beam and was tied to a brace.

On the day of the accident, the gang on the scaffold next to that upon which the appellant was working, finished their "stretch," and one of the men went upon the beam to lower their scaffold, and by mistake unfastened the penant to the scaffold upon which appellant was at work, which caused that scaffold to suddenly drop or tilt at one end and precipitate appellant to the floor below, occasioning to him the injuries on account of which he sued.

The penant so inadvertently unfastened, was tied about five feet from the one intended to be loosened. The appellant never spoke to, and had no personal acquaintance with the members of the gang of which he who unfastened the rope was one, although he knew their names; nor did that gang and the one of which appellant was one always work on scaffolds next to each other, and there was evidence that tended to show that the two gangs had never before that day worked on scaffolds next to one another.

What constitutes co-employes fellow-servants, so as to exempt the common master from liability for injuries

resulting to one from the negligent act of the other, both being engaged in parts of the same general enterprise, need not be said by us here, except by a reference to the cases of *C. & N. W. R. R. Co. v. Moranda*, 93 Ill. 302, and *Rolling Mill Co. v. Johnson*, 114 Ill. 57.

The definitions there laid down as to who are such co-employees must be regarded as the best expression of what in law constitutes such relationship. But as to when in fact such relationship exists, is often a question of exceeding difficulty, and this case is no exception. Perhaps it is as much because of that difficulty, as of anything else, that it has been wisely left to the jury, under correct instructions defining what in law constitutes the relationship of fellow-servants, to determine the question of fact whether in the particular case the relationship exists or not.

The judgment having to be reversed because such question was taken from the jury, it would be improper for us to point out wherein the evidence tended to show a lack of such consociation and opportunity for the exercise of mutual influence for the promotion of caution in each other.

The most we should say in that regard, so as to leave the question unprejudiced to either party before another jury, is to express the opinion that it is plain that reasonable and fair-minded persons might well differ in their conclusions drawn from the evidence, as to whether, under the law defining what the relationship must be between co-employees in order to make them fellow-servants, such relationship between appellant and the servant who untied the rope, did in fact exist.

Unless "the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff, that such verdict, if returned, must be set aside," the case should be submitted to the jury. *Simmons v. Chicago and Tomah R. R. Co.*, 110 Ill. 340.

It is only where there is no evidence before the jury on a material issue in favor of the party holding the affirmative of that issue, on which the jury could, under the law,

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reasonably find in favor of such party, that the court may properly exclude the evidence or instruct the jury to find against him. *Frazer v. Howe*, 106 Ill. 573.

Because of the error in peremptorily instructing the jury to find for the appellee, the judgment of the Superior Court will be reversed and the cause remanded.

Mary A. Furman, Impleaded, etc., v. Frances Rapelje et al.

1. **CONSIDERATION**—*When Material*.—When the question in controversy is whether a lease to defendant is for his sole use, as he maintains, or was made to him in trust for the benefit of himself and others, it is not error to deny him the right to testify in regard to the consideration for the lease, as that is not material.

2. **SALES**—*Who Responsible for Proceeds of*.—Where two persons hold separate properties in trust for the same purpose and join in one instrument, disposing of them for a bulk consideration, it is proper to enter a decree against them jointly for the entire proceeds of such sale.

3. **PURCHASERS**—*When Protected Against Equities*.—Receiving a conveyance in payment of a pre-existing debt, is not sufficient to transfer a title against a superior equity, where there is a collision of *bona fide* claims.

4. **PAYMENT**—*When Enforced*.—Payment of the stipulated price for property sold will be enforced, although the title to the property was not transferred in the precise way stipulated in the contract.

Bill, to enforce a trust, for an accounting and injunction. Error to the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

CHAS. WHEATON, attorney for Mary A. Furman, plaintiff in error.

HANCHETT & PLAIN, attorneys for John C. Furman, plaintiff in error.

WILLIAM GEORGE and RUSSELL P. GOODWIN, attorneys for Cornelia Furman, plaintiff in error.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for Frances Rapelje, Eliza Cook, Mary Stebbins and Elizabeth O'Hara, defendants in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a bill in equity to enforce an express trust by an accounting, and, incidentally, for an injunction.

One Cornelius Furman, being then an aged man, on August 10, 1887, executed and delivered to John C. Furman, one of his sons, a lease for a term of ninety-nine years, of a portion of certain premises belonging to him, and occupied by him as a homestead, in the city of Aurora, in Kane county, of the value of about \$2,500, at an annual rental of ten dollars and the payment of taxes and assessments.

About fifteen months later, and about three weeks before his death, the said Cornelius executed and delivered to another of his sons, William C. Furman, as trustee, a judgment note, dated November 12, 1888, for \$3,500, on which a judgment was confessed on November 14, 1888, and execution thereon was issued and levied upon the entire lot, of which the lease covered a part, and which comprised all the real estate owned by the said Cornelius.

The said Cornelius then died on December 5, 1888, leaving surviving him his said two sons, John C. and William C., and four daughters, Frances Rapelje, Eliza Cook, Mary Stebbins, and Elizabeth O'Hara, all children by his first wife, and Arther Rhodes, the son of a deceased daughter, also by his first wife, and Cornelia Furman, his second wife, besides some children by said second wife.

The said four daughters and grandson are the defendants in error, and the said widow, with the one son, John C., and his wife, Mary A., are the plaintiffs in error.

Shortly after the death of Cornelius, his said widow opened negotiations with the said children by his first wife to secure to herself the property which was the subject of said lease, and on which said judgment was a lien. It seems that said premises constituted all the estate left by

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Cornelius, and were worth about \$5,000, and that he left no debts. Those negotiations culminated on February 8, 1889, in a written agreement entered into on that day between the said sons, John C. and William C., of the one part, and the said widow, Cornelia, of the other part, wherein it was recited that William had sold and assigned to Cornelia the said judgment, and that Mary A. Furman, wife of John C., had assigned to Cornelia the said lease (the same having been previously assigned to said Mary A. by her said husband), and that the said William C. and John C. had agreed to procure for and deliver to the said Cornelia quit-claim deeds and releases of all claims against the estate of the said Cornelius, deceased, by each and every of his said children and heirs at law (by his first wife), naming them, for the consideration of three thousand dollars, agreed to be paid by the said Cornelia as follows: \$2,000 in cash, \$500 in her promissory note to William C., as trustee, payable one day after date, and the remaining \$500 to be paid to the said William C. upon the delivery to her of said quit-claim deeds and releases within five months from that date.

The \$2,000 was paid, and the \$500 note was given by Cornelia as agreed, but there being a failure to deliver to her the quit-claim deeds and releases, as agreed by William and John, she subsequently procured all of said real estate to be sold under the execution issued upon said judgment, and bid it in at the sale, and afterward procured a sheriff's deed for the same.

The failure to deliver the quit-claim deeds and releases to Cornelia seems to have operated as a pretext, if not more, for Cornelia to fail to pay either the note she gave or the \$500 agreed by her to be paid on the delivery of the deeds and releases; so that in fact she has never paid but the \$2,000 cash down, of the \$3,000 she agreed to pay, and of that \$2,000, none of the defendants in error ever received any part. Immediately after the \$500 note of Cornelia was delivered to William C., he transferred it to Mary A. Furman, the wife of John C., and she subsequently

brought suit upon it, which suit was pending when this bill was filed, and its further prosecution was enjoined by the decree herein entered.

Because of the failure of John and William to account with their sisters and the said Arthur Rhodes for any part of the money received by them from Cornelia, they (being the defendants in error) filed this bill to compel an accounting by John and William for such moneys, and by Cornelia for the \$1,000 remaining unpaid by her under said agreement, and incidentally, to prevent the prosecution of the suit upon said note, and to prevent Cornelia from paying it to the said Mary A. Furman, and the decree gave substantially the relief asked.

The claim by the defendants in error was, that Cornelius Furman, being aged and threatened with death, undertook and intended, through the instrumentalities of said lease to John and judgment note to William, to create a trust in John and William for the benefit of the children of the said Cornelius by his first wife, including themselves. They did not admit the authority of either John or William to dispose of the lease and judgment note in the manner pursued, but were willing to ratify their action in that regard, upon being paid their share of the proceeds.

William C. Furman does not join in the prosecution of this writ of error. The decree found that, as to him, said judgment note for \$3,500 was made by the said Cornelius Furman to the said William as trustee for the benefit of the defendants in error, and that he accepted said note upon the express trust that he was to distribute the proceeds thereof equally between them.

As to John C. Furman, the decree found that although said lease for ninety-nine years, made to him by his father, Cornelius, did by its terms give to said John the use of the premises therein described, yet it was the intention of Cornelius that John should hold the same for the use and benefit of the said children, and grandchild, of Cornelius by his first wife, and that John accepted the lease for such purpose and upon such trust.

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Upon the facts and circumstances shown by the record, there can be but little, if any, doubt of the establishment of the express trust found by the decree to have been created in John by the giving and acceptance of the lease.

On the day before the death of Cornelius, which was before John had assigned the lease to his wife, and was while he held it, John said in the presence of Cornelius, the father, and of numerous persons, after the lease had been read in the presence of himself and them, and in answer to a question put to him by one of his sisters, that his father "wanted me to sell or dispose of the lease and divide the proceeds among his heirs by my mother, his first wife."

Although this admission was denied by John in his testimony, still it was proved by a very decided preponderance of evidence.

But it is contended that, this admission having been testified to, it was error to deny to John, as was done, the right to testify what the consideration of the lease was and what it was given for, and this contention is participated in, also, by Mary A. Furman.

The bill was to enforce an express parol trust. No evidence had been or was introduced by the complainants, of what the consideration for the lease was, or as to what the creator of the trust had declared it to be, but only what John, the trustee, had admitted the trust to be. John was allowed to, and did, testify that the lease was to himself for his own sole benefit, and to deny that he had ever made the admissions which the complainants' witnesses had testified were made by him; and we think he was properly denied to go further and testify to the consideration of the lease. Even if he had been permitted to go into a narration of what the consideration was, it would not have detracted from the force of his admission, nor added anything to his claim that he was the sole beneficiary under the lease.

It is contended further by John C. Furman, that it was error to find him to be jointly liable with William C. Furman, for the proceeds of the sale to Cornelia Furman. We do not so regard it. Both John and William were trustees,

and if not originally joint trustees, we think they became such by joining in one instrument disposing of the trust property for a bulk consideration.

Under the terms of the agreement they made with Cornelia Furman, they were to receive an entire consideration for the lease and the judgment. There does not appear to be any way of determining how much of that consideration was to be paid for the lease, or how much for the judgment. They chose to agree to accept an entire sum for what each severally held in trust for the same beneficiaries, and we think were properly held to be jointly, as well as severally, liable to account for that entire sum, less their share of it, so far as it has come to their or either of their hands, which is all that the decree charges them with.

As to the plaintiff in error, Mary A. Furman, it is objected that she was a good faith purchaser for value of the ninety-nine year lease made by Cornelius to her husband, John C. Furman.

The bill prayed no relief against her, and none was given by the decree, except to enjoin her from the prosecution of her suit upon the \$500 note given by Cornelia Furman, (payable to William C. Furman, trustee,) in part consideration for the lease and judgment, and ordering that the note be canceled, in order that Cornelia Furman might not be imperiled by the payment to defendants in error of the remaining \$1,000 agreed by her to be paid, of which sum the \$500 note made a part. Mary A. Furman paid for that note by giving for it \$500 out of the \$1,500 which she received from her husband and William at the time Cornelia Furman paid the \$2,000. She therefore used in the purchase of the note, a part of the trust funds, and unless she can be protected by her lack of notice that the lease was held in trust by her husband, and that she was a *bona fide* assignee thereof for value, she can not complain of the decree perpetually enjoining her from prosecuting her suit upon the note and requiring her to surrender it for cancellation.

By her answer she states that she bought the lease from

Furman v. Rapelje.

her husband on or about January 11, 1889, and that he assigned the same to her "for a good and valuable consideration," without stating what it was.

In her testimony she says the lease was assigned to her by her husband, "as payment for money that I (she) borrowed of the school trustees of Sugar Grove; the lease was given to me by my husband in payment of the money that I had borrowed, because I had borrowed it in my own name upon my note, which I think my husband signed with me. The note was secured by a mortgage on my farm, which I had owned some fourteen years; I got it of my husband; that note was dated June 13, 1887. My husband is now engaged in farming upon that farm." And she further testified that she paid on account of the mortgage on her farm to secure her and her husband's note, all of the \$1,500 that remained after paying \$500 for the \$500 note. She also testified that she let her husband have all but \$300 of the \$1,882.25 borrowed on the security of her farm.

She therefore paid no new consideration for the lease. It was given to her by her husband simply as a protection against an incumbrance she had placed upon her farm more than a year and a half before, for his benefit, and which she had not paid. She parted with nothing on the faith of the lease, and lost nothing by taking the assignment of the lease.

Under such circumstances we can not regard her as a *bona fide* purchaser of the lease. The rule applicable to the assignment of negotiable instruments does not apply here.

"A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a *bona fide* purchaser, since the creditor surrenders no right, and places himself in no worse legal position than before." 2 Pomeroy's Eq. Juris., Sec. 749.

"Receiving a conveyance merely in payment of a pre-existing debt, is not sufficient where there is a collision of *bona fide* claims." Met. Bank v. Godfrey, 23 Ill. 579.

Moreover, when we consider all the evidence contained in the record, and the circumstance that the \$500 note was

payable to William as "trustee"—which she testified she supposed meant that it was "held in trust for others"—the presumption is strong that she had notice of the trust relationship held by both her husband and William.

The decree, so far as she is concerned, affects only her right to the \$500 note, and requires nothing of her concerning the \$1,000 which remained to her, out of the \$1,500 which she received.

That her husband, John C. Furman, is charged by the decree with that sum as having come to him and William, is no ground for her to complain, and our conclusion is that the decree, so far as it affects her, is right.

The objections by Cornelia Furman to the decree against her, which provides that she shall pay to the plaintiffs in error the \$1,000 remaining unpaid under her agreement with John C. and William C. Furman, less the sum of sixty-nine dollars expended by her in perfecting her title under the sheriff's deed, with interest, etc., may be briefly dismissed. Her main objection is, that her demurrer to the bill as amended should have been sustained, because there was no allegation that the quit-claim deeds mentioned in her contract with William and John, were ever tendered to her.

We do not think such an allegation was necessary. The bill was not one for specific performance, but to enforce a trust and for an accounting. The tender of such deeds became unnecessary by reason of the perfecting of the title in Cornelia Furman by a sheriff's sale and deed to her, under the \$3,500 judgment, there being no debts against the estate of Cornelius. That sale and deed gave her the absolute title to the property, and there is no attempt by the decree to disturb her in her title so acquired.

Indeed, the whole theory of the bill and decree is based upon a ratification of the title by all persons who might possibly attack it. It would be a useless formality to require the tender of the deeds, and equity will not require that to be done, which, if done, would be useless.

There is no claim asserted against Cornelia Furman, and

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the decree establishes none, except that she shall pay the remainder of her contract price.

Although she has not got the title in the precise way the contract contemplated, she has obtained it in a method which the contract gave her the means of doing, and it is only equitable that she should pay for it. The whole object of the contract, which was to secure to her the title to the property, has been accomplished, and we see no reason for a further consideration of her objections.

Without discussing every objection urged against the decree by each of the plaintiffs in error, we have considered them all, and upon such consideration we think the decree is substantially correct, and that it should be affirmed.

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Lawrence Meehan, Adm'r, v. Chicago & N. W. Ry. Co.

1. TRESPASSERS—*Upon Railroad Tracks*.—A railroad company is not liable for injuries to persons trespassing upon its right of way, unless the acts resulting in such injuries are wantonly or willfully committed.

2. AMENDMENTS—*When Properly Refused*.—When, after all the evidence in a case was in, the plaintiff moved to amend his declaration but the court refused to allow the amendment, and it appeared from the record that if the case had been left to the jury upon the evidence and a verdict rendered in favor of the plaintiff it would have been set aside, even if the amendment had been allowed, *it was held* that the amendment was properly refused.

Action, for personal injuries. Error to the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 5, 1896.

KING & GROSS, attorneys for plaintiff in error; ANDREW J. HIRSCHL, of counsel.

A. W. PULVER, attorney for defendant in error; LLOYD W. BOWERS and E. E. OSBORN, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On June 18, 1885, the plaintiff's intestate, a boy a little more than five years old, was killed by being run over by a moving freight car on the tracks of the defendant.

The declaration charged that the child was, when struck, upon Erie street, a public highway.

After the evidence on both sides had been closed, the plaintiff's counsel offered to amend each count of the declaration by alleging that the place of the accident was within the lines of Union street, but his motion was denied, whether correctly or not we need not decide, for in the view we take of the case, we regard it to be immaterial.

Near to the spot where the child was killed, a viaduct existed, rising out of both Erie and Union streets, considerably above the original grade of both streets, and extending eastwardly across and above the tracks of the railroad and over the north branch of the Chicago river.

Underneath the viaduct a system of tracks, nearly thirty in number, runs diagonally across the lower or natural surface of both streets, (if we concede that Union street extends beyond its junction with Erie street,) and constitutes what is called a railroad yard.

On the north side of the viaduct opposite where Union street joins, on the viaduct, with Erie street, is a stairway which leads down from the viaduct to the surface of the ground where the tracks exist, and lands close to some of the railroad tracks.

That stairway appears to be wholly within the street lines, and is reached from the sidewalk on the viaduct by an entrance or platform, as wide as the stairs, that juts out from, and on a level with, the sidewalk, and is probably, as alleged in the declaration, a part of the highway.

On the ground below the viaduct stood store-houses, among which was an ice-house, which, as was testified, was about fifteen feet from the foot of the stairway, and appears, by the plat in evidence, to extend to some extent upon the lower surface of both Erie and Union streets (if the latter street extends north of Erie street).

On the day in question, plaintiff's intestate, then, as said, about five years old, with two little girls, went down the stairway, and engaged at play in some shavings at the side of the ice-house, standing on the level of the railroad tracks and near them. The last that the little girls who were with him, saw of the boy before the moment of his hurt, he was sitting with them on the shavings. The girls were filling their bean bags, and the next that attracted their attention toward the boy was they heard a cry from him, and as they looked up they saw him in the act of falling as if from the brake-beam of one of two cars that were being backed southwardly and nearly in front of where they were sitting.

The verdict of the coroner's jury was also that the boy came to his death by being run over "while riding on the brake-beam of said car."

The only witness besides the girls, who testified to having seen the accident, was one Charles Vallette, whose evidence would seem to indicate that the child was run upon by the cars while he was playing upon the tracks in front of them.

Giving to his testimony the most favorable construction for the plaintiff in error that it is susceptible of, the defendant would only be liable for wantonly or willfully causing the injury complained of, and there is no evidence in the case that tends to support wantonness or willfulness in the defendant. And the entire absence of such evidence sufficiently answers the assigned error in refusing, after all the evidence was in, to permit the plaintiff to amend the declaration by charging that the acts of the defendant were wanton, willful and reckless.

We have carefully considered the entire record, and are satisfied that if the case had been left to the jury, and a verdict rendered in favor of the plaintiff, it should have been set aside, even if the offered amendment had been allowed.

As this court said in *R. R. Co. v. Roath*, 35 Ill. App. 349, "There can be no negligence without the failure to observe some duty;" and the further observations in the opinion in

that case concerning the lack of duty by railway companies to prevent children from climbing on cars at street crossings, (even if it be conceded that the place of this accident was at a street crossing,) are applicable here. See, also, *E. St. L. C. Ry. Co. v. Jenks*, 54 Ill. App. 91.

The trial court instructed the jury to return a verdict for the defendant, and, we think, correctly.

The judgment of the Superior Court will, accordingly, be affirmed.

M. I. Goodman v. J. I. Kopperl et al.

1. ADMINISTRATION OF ESTATES—*Province of Courts of Chancery*.—The jurisdiction of a court of chancery over estates of deceased persons has not been taken away by our statute concerning the administration of estates, and equity retains a general jurisdiction over the settlement of estates, concurrent with, but paramount to, that possessed by the probate courts, yet, primarily, the administration of estates of deceased persons is committed to the Probate Court, and a court of chancery can not and will not take jurisdiction save in very extraordinary and unusual cases, where the remedy afforded by the statute is inadequate.

2. ADMINISTRATION OF ESTATES—*Jurisdiction of Courts of Chancery Over Claims*.—A court of equity will not ordinarily assume jurisdiction of a claim against an estate until the claimant shall have had his claim allowed by the County Court, and then if any reason that may be deemed sufficient, can be assigned why that court can not afford the requisite relief, equity will assist him, but not otherwise.

Bill, to settle an estate. Error to the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

STATEMENT OF THE CASE.

This is a writ of error to reverse a final order dismissing complainant's bill, as amended, for want of equity, and vacating the order appointing William C. Malley receiver of all the property, assets and effects of Alexander Kopperl, deceased.

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169s	136

67	42
179s	338

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The record in this case discloses that on May 4, 1896, M. I. Goodman, plaintiff in error, filed a bill in equity in the Superior Court of Cook County, on behalf of himself and all other creditors of Alexander Kopperl, alleging, in substance, the following:

That prior to February 11, 1896, Alexander Kopperl kept a small savings bank at No. 571 South Canal street, in Chicago, Illinois; that upon said February 11th, for some time prior thereto, and at the date of the filing of said bill of complaint, said Alexander Kopperl was indebted to complainant in the sum of six hundred dollars for moneys theretofore deposited in the bank of said Kopperl by said complainant, and that said indebtedness now remains wholly unpaid; that on February 11, 1896, said Kopperl, being then seventy years old, left the city of Chicago, and being in a demented condition, ended his life by committing suicide. That on said last afore-mentioned date, said Kopperl owed the depositors and creditors of his said bank, to wit, the sum of forty thousand dollars, and had assets with which to pay his said creditors, the sum of, to wit, five thousand dollars, and that upon said last mentioned date, and continuously since, said Kopperl has been wholly insolvent, unable to meet his debts, or to pay any of his obligations.

The bill further alleges that said Alexander Kopperl's bank has approximately some 200 depositors, who are creditors in amounts varying from ten dollars to three thousand dollars. That by reason of the insolvency of said bank, said creditors, who are poor people, are in the most straightened circumstances and have no resources whatsoever. That after the disappearance of said Kopperl on February 11th, said Kopperl's bank still continued to do business up to February 14, 1896, under the management and control of Amalia Kopperl, wife of said Alexander Kopperl, but that upon said February 14, 1896, she believing her husband to be dead, and then and there being awed and frightened by the clamor of the depositors of said bank, visited the office of her then lawyer, A. D. Weiner, and he

(said Weiner) being advised as to the condition of the affairs of said Kopperl, directed said Amalia Kopperl to then and there make a voluntary deed of assignment of all the property and effects of said Alexander Kopperl, and she, acting under the advice of said Weiner, then made a pretended deed of assignment to one Horace H. Stoddard, Mrs. Kopperl signing said pretended deed of assignment as the agent of said Alexander Kopperl, who was then dead. That at the time she executed and delivered the pretended deed of assignment, she had no authority, either verbally or in writing, to execute or deliver the same, and did not know the contents, nor the force nor efficacy of the same. And that said pretended deed of assignment has never been ratified, sanctioned or approved by said Alexander Kopperl, deceased.

The bill further alleges that said Stoddard immediately attempted to reduce the property of said Alexander Kopperl to possession, and that he (said Stoddard) now claims and seeks to hold said property, consisting of a few hundred dollars, a few notes and checks, the property of said Alexander Kopperl, certain property therein described, and a claim against the insolvent estate of J. I. Kopperl, the son of said Alexander Kopperl, and one of the defendants in error.

That said Stoddard, either as such pretended assignee, or individually, has no valid claim, lien or right to hold any of said property and effects, as aforesaid. That there is property of said Alexander Kopperl, deceased, now in the possession and control of said defendants, A. D. Weiner and Simeon E. Baum (attorneys); that in addition there is a claim for the sum of, to wit, ten thousand dollars, against the defendant, J. I. Kopperl, who, prior to February 14, 1896, made a voluntary deed of assignment to John H. Francis, assignee.

The bill then describes certain real estate, located in Cook county, Illinois, the property of said Alexander Kopperl, and alleges that said property stands in the name of said Kopperl, incumbered by one trust deed to Schreiber,

Goodman v. Kopperl.

trustee, and one trust deed to the Title Guarantee & Trust Company, as trustee, said trust deed having been given prior to the filing of said bill of complaint, to secure a pretended and fictitious indebtedness of twenty-three thousand five hundred dollars. That said indebtedness, as complainant is informed and states the fact to be, is not *bona fide*, and that a large part of said indebtedness, secured by said trust deeds, is fictitious and made for the purpose of clouding the title to said property, and preventing complainants and other creditors of said Kopperl from satisfying their said claims out of said property.

The bill further alleges "that said Kopperl died intestate, leaving no will, and leaving as his sole heirs and devisees said Amalia Kopperl and J. I. Kopperl; that no administration of the property, assets and effects of said Alexander Kopperl has been or is now being conducted in the Probate or County Courts of said county or in the probate or any court of any county in the State of Illinois, or in any court or courts whatsoever, but on the contrary, no one is caring for said property or conserving the same for the benefit of your orator and the other creditors of said Alexander Kopperl." And that one of the most valuable assets of said Kopperl's estate is the rent which said Kopperl in his lifetime obtained for said premises, and that no one is now caring for said property or collecting the rents therefrom; and that one of the valuable assets of said Kopperl is the claim against the insolvent estate of said J. I. Kopperl, and that no one is asserting said claim against said estate for the benefit of complainant and the other creditors of said Alexander Kopperl, deceased.

The bill further alleges that said deed of assignment sought to convey to said Stoddard the real estate described in said bill of complaint, and that said conveyance is fraudulent, fictitious and of no force and effect, and that by reason of said pretended deed of assignment said Stoddard now claims to own said property as such assignee in fraud of the rights of the complainant and the other creditors of said Kopperl.

“That said real estate is incumbered by a trust deed to William Schreiber, trustee, and a trust deed to the Title Guarantee & Trust Company, for the purpose of securing a pretended indebtedness of twenty-three thousand five hundred dollars, and that said indebtedness is not in whole or in part *bona fide*; that said indebtedness is fictitious and made for the purpose of clouding the title to said property, and for the purpose of preventing the satisfaction and payment of the claim of complainant and the other creditors of said Kopperl.”

The bill further alleges that said property is being rapidly dissipated by attachments already levied and others threatened to be levied, and that said attachments already levied were sued out after the death of said Alexander Kopperl, and therefore void, and that if said real estate is conserved and the rents collected, and the other property of said Kopperl, deceased, cared for and a receiver appointed to take charge of all of said property and to assert the claims of said Alexander Kopperl, deceased, against the estate of said J. I. Kopperl, a considerable sum may be realized for the payment of the claims of complainant and other creditors of said Kopperl, deceased.

The bill then makes defendant the various parties above mentioned, prays for the appointment of a receiver for the purposes mentioned in said bill “and for the purposes of administration upon the whole estate of said Alexander Kopperl, and for the purpose of paying the claims of your orator, and other creditors of said Alexander Kopperl who may become parties to this, your orator’s said bill of complaint.” That said conveyance to said Stoddard, assignee, be set aside and held for naught, and for other relief.

Upon the filing of the bill an order was entered appointing William C. Malley receiver of all the property, assets and effects of said Alexander Kopperl mentioned in said bill of complaint, and authorizing said receiver to take possession of all the property, assets and effects of Alexander Kopperl, deceased, for the benefit of complainant and the other creditors of said Alexander Kopperl.

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On May 19, 1896, general and special demurrers were filed to said bill of complaint. The only grounds alleged in said demurrers as special grounds for demurrer being "that said complainant has an adequate remedy at law by obtaining the appointment of an administrator to take possession of said chattels and said estate or sue for same and to sell said real estate, and as a further ground they say that the complainant has no judgment and must establish his claim at law or in probate."

On July 10, 1896, after argument, said demurrers were sustained to said bill, and the complainant electing to stand by his bill, the same was dismissed for want of equity, and the order appointing William C. Malley receiver thereupon vacated and held for naught. From which order dismissing said bill for want of equity this writ of error is prosecuted.

MORAN, KRAUS & MAYER, attorneys for plaintiff in error.

ROSENTHAL, KURZ & HIRSCHL and SIMEON E. BAUM, attorneys for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is a bill filed by a creditor of a decedent, charging the making of fraudulent conveyances by the deceased, the insolvency of his estate, that no letters of administration have been issued thereon, and that in consequence the property left by the deceased is in the hands of persons who are endeavoring to convert the same to their own use, and that such property, by reason of the want of any person authorized to properly care for and administer the same, is likely to be entirely frittered away and lost, so that the creditors of the deceased, to whom such property belongs, will receive nothing as the avails thereof.

Under these allegations it is sought, by the aid of a receiver, to take the administration of the entire estate into a court of chancery, not calling upon, and leaving the Probate Court with nothing to do in the premises.

While it is true that the jurisdiction of the court of chancery over estates of deceased persons has not been taken away by our statute concerning the administration of estates, it is, nevertheless, the case that, primarily, the administration of estates of deceased persons is committed to the Probate Court, and that a court of chancery can not and will not take jurisdiction and so administer, save in extraordinary and unusual cases, even if in any case it will, in the first instance, before there has been any attempt to administer through the agency of the Probate Court, take upon itself the entire task of administration, carrying it on to the end, so that there shall be nothing left for the Probate Court to do.

In High on Receivers, Secs. 706 to 724, the subject of the appointment of receivers over executors and administrators, as well as before the appointment of such, for the preservation of an estate, is considered. Many illustrations are given of the rules by which a court of chancery is guided in attempting to administer upon the estate of a deceased person, or in interfering with an administration already going on; but it is nowhere stated that the court will, in any case, ignore the Probate Court and itself proceed to administer. The same is true of what is said in Kerr on Receivers, pages 28 to 38; and it is stated that the court of chancery will appoint a proper person to protect a testator's estate where circumstances require it, until a legal, personal representative is appointed; but a bill to protect and also to administer the estate is irregular. *Overington v. Ward*, 34 Beavan, 175.

In Pomeroy's Eq. Jur., Vol. 3, Sec. 3, chapter concerning the administration of estates, page 98, it is said in substance, that in a number of the States of the Union, among them Illinois, the general principle regulating the exercise of all jurisdiction concurrent with that of the Probate Court in the administration of estates, prevails; and that when either court has assumed jurisdiction of a particular case, the other tribunal will not ordinarily interfere.

In the note found upon page 104, as to the probates in

the State of Illinois, it is said, that "the theory is admitted by later as well as earlier cases in this State, that equity retains a general jurisdiction over administrations, concurrent with, but paramount to, that possessed by the Probate Courts, and the only practical question is, when will that jurisdiction be exercised. The earlier decisions allowed its exercise somewhat more freely than is done by the later ones; they seem to have permitted a resort to equity in the first instance instead of to the Probate Court, for the purpose of an accounting and final settlement, without any special ground alleged; and also for the purpose of re-examining and correcting a settlement made by a Probate Court, with which a party was dissatisfied. The more recent cases, while fully admitting the existence of this jurisdiction, have repeatedly declared the rule to be, 'Courts of equity will not exercise jurisdiction over the administration of estates, except in extraordinary cases. Some special reason must be shown why the administration should be taken from the Probate Court.' "

The same work, Vol. 3, Sec. 1332, in treating of the cases in which a receiver may be appointed to take charge of the estate of a decedent, says: "During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property, and of the rents and profits of the real estate, where there is any danger of their loss, misuse, or misappropriation. The necessity of such a receiver has been greatly lessened by modern statutes authorizing the Probate Court to appoint an administrator *ad litem*, and enlarging his powers."

The same author in Vol. 1, Sec. 77, in speaking of the jurisdiction of equity in the matter of settling the personal estates of deceased persons, says: "In the American States these matters are all governed by statutes, which determine the nature and regulate the application and distribution of assets by fixed and certain rules, binding alike upon all tribunals. Probate Courts are established for the settlement

of decedents' estates, and all questions arising in the course of administration are decided by them to the practical exclusion of the equity jurisdiction."

Equitable suits growing out of pending administrations are still frequent, but they are brought for some special and partial relief; for the construction of a will; the determination of a controversy arising with respect to a particular legacy; the adjustment of conflicting claims to a particular fund, and the like. It is true that the statutory rules for the settlement of estates are largely based upon the principles which had been settled in equity, and that equitable doctrines are constantly enforced by the courts of probate; but it is no less true that this important head of equity jurisdiction has been greatly restricted, or even practically abandoned, in all the States.

It is urged that this is a creditor's bill, and that in the case of a claim against the estate of a deceased person, where a fraudulent disposition of his estate, or some portion thereof, by the debtor in his lifetime, is alleged, it is not necessary, for the maintenance of a creditor's bill, that the claim shall have been reduced to judgment, or allowed in a Probate Court.

In *McDowell v. Cochran*, 11 Ill., page 31, the court sustained a bill filed against the administratrix of the estate of Adam Cochran, the estate being alleged in the bill to be insolvent, it appearing that the complainant had obtained judgment, and thereby, as the court said, exhausted his legal remedy; it not being permitted that he should have execution issued against the administratrix. The court said: "Under our statute, an execution can not issue on a judgment against an administrator, but the judgment is to be paid in due course of administration, as all other claims against the estate."

So in *Steere v. Hoagland*, 39 Ill. 264, certain judgment creditors of the deceased were allowed to file a creditor's bill, seeking to set aside a fraudulent transfer of a stock of goods, made by the decedent in his lifetime, without having had an execution issued and returned no property found. The court in that case did say (but the statement was

unnecessary to a decision of the case, because the complainants were judgment creditors): "When a fund is only accessible to a court of chancery, and can not be reached at law, and where the debtor is deceased, creditors may resort to chancery in the first instance, without having recovered a judgment at law."

In *Garvin, Bell & Co. v. Robert Stewart's Heirs*, 59 Ill. 229, a creditor filed a bill against the heirs of a deceased partner, the complainant having obtained judgment against the surviving partner; the purpose of the bill being to subject real estate which had descended to the heirs of the deceased, to the payment of a partnership debt, the surviving partner being alleged to be insolvent. A demurrer to the bill was sustained by the Circuit Court, which decree was affirmed by the Supreme Court. In that case the Supreme Court said:

"In this case, however, there is no traversable allegation that there are no assets or personal property, out of which the debt could be made by administration. The creditor's lien is only a secondary one, depending upon whether there are personal assets. It is not until they are exhausted that the administrator is authorized to apply for leave to sell real estate for the payment of debts. If there are assets, the law has appropriated them to the payment of this and all other debts the testator may have owed, and they should be exhausted by administration before the lien on real estate could be made available.

Again, there is no positive and traversable allegation that there are no other creditors of Stewart's estate. If there are, then plaintiffs in error have no superior claim or lien to theirs. And in case there are other creditors, to entertain this bill would be to transfer the settlement and administration of the estate to a court of equity, while the statute has designated another tribunal and prescribed a different mode for the settlement and distribution of estates, more expeditious and less expensive than in a court of chancery.

There are, however, cases, where there are complicated equities, which might authorize a court of equity to enter-

tain jurisdiction, and having done so, it would retain the case and do complete equity to the parties. But in this case the facts are simple, and we can see no reason for taking the case out of the usual course of administration. If letters of administration should be granted, no reason is perceived why the claim of plaintiffs in error should not be allowed against Stewart's estate, if just and subsisting, or that would prevent the administrator from applying for an order for the sale of this land. Although equitable, the claim is cognizable in the Probate Court."

In the present case it appears from the bill, that there are personal assets of the estate which have not been applied to the payment of debts; the complainant's bill therefore falls directly within the principle enunciated in *Steere v. Hoagland*.

In *Harris v. Douglas*, 64 Ill. 466, the court, upon page 469, says:

"A court of equity will not assume jurisdiction except in extraordinary cases where the remedy afforded by the statute is inadequate. It is for the very plain reason that the statute has pointed out a different mode, and the party must pursue the remedy provided by law.

By the provisions of the statute of wills, claims against estates are to be classified, and some are to be paid in full, and others *pro rata*. A claimant can not avoid this statute by resorting to a court of equity. The law is settled, in this State, at least, that a court of equity will not ordinarily assume jurisdiction until the claimant shall have exhibited his claim and had it allowed in the County Court, and then if any special reasons, that may be deemed sufficient, can be assigned why that court can not afford the requisite relief, equity will assist him, but not otherwise." *Armstrong v. Cooper*, 11 Ill. 561; *Freeland, Ex'r, v. Dazy et al.*, 25 Ill. 296; *Heustis v. Johnson*, 84 Ill. 61; *Crain v. Kennedy*, 85 Ill. 340; *Duval v. Duval*, 153 Ill. 49.

In *Wood v. Johnson*, 13 Ill. App. 548, the court reiterated its former announcement that a court of chancery will not exercise jurisdiction over the administration of estates except in extraordinary cases.

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In *Scripps v. King*, 103 Ill. 469, the court declares that before a creditor can maintain a bill against an insolvent estate, he must have had his claim properly allowed against the estate, although his bill be to remove a fraudulent conveyance and reach the property so conveyed, to satisfy his demand. The same rule is declared in *Winslow v. Leland*, 128 Ill. 304.

A party filing a creditor's bill is entitled to priority over such bills subsequently filed.

If the present bill can be maintained, the complainant will be entitled to have the assets of the insolvent estate first applied to the payment of his claim. Subject to certain statutory rights of the family of a deceased person, his personal estate belongs in the first instance to his creditors; certain classes of claims have precedence over others, and his real estate descends to his heirs, their title being subject to be divested for the purpose of satisfying claims of creditors remaining after the exhaustion of the personal estate.

The complainant's interest as a claim upon the estate of the deceased, stands *pro rata* upon a footing equal only to that of the numerous other creditors alluded to in the bill. No reason is shown why this complainant has not heretofore exercised his right as a creditor, and taken out letters of administration upon this estate; nor does there appear to be any obstacle in the way of letters yet being taken out and this estate administered and distributed by the Probate Court in accordance with the statutes of this State.

The decree of the Superior Court dismissing the bill for want of equity is affirmed.

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1. LIMITATIONS—*Constructive Trusts—Fraud.*—The statute of limitations is not necessarily controlling as to the time within which relief is to be sought in the case of a constructive trust by reason of fraud. A demand may be stale and not entitled to relief under the circumstances of the case, although much less than the time allowed by the statute of

limitations has elapsed; and so a party may be entitled to relief, although much more than the statutory limit has elapsed.

2. *SAME—Where a Party Has Knowledge of Fraud—Laches.*—If a party has knowledge of the fraud, a want of evidence will not excuse his delay, nor will poverty or inability to prosecute the action. If there has been great delay, the courts will require very clear evidence to impeach a transaction as fraudulent, and to convert the fraudulent party into a trustee.

3. *SAME—Stale Claims in Equity.*—A court of equity will often treat a lapse of a less period than that provided in actions of law as a presumptive bar on the ground of discouraging stale claims, gross laches or unexplained acquiescence in the assertion of an adverse right. Fraud is not a sufficient excuse for the laches of the complainants.

Bill for Relief.—Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 5, 1896.

STATEMENT OF THE CASE.

This is an appeal from a decree dismissing a bill in substance as follows :

“ Milo G. Kellogg brings this his bill against the Western Electric Manufacturing Company and the Western Electric Company, successor thereto.

And thereupon your orator says that in the year 1879 he was an officer and employe of the Western Electric Manufacturing Company, a corporation organized for the purpose, among other things, of manufacturing and selling electrical apparatus and machinery under contract and otherwise, and especially apparatus, appliances and instruments connected with the art of telegraphy, and the then modern art of telephony. That it was not any part of his duties as such officer and employe to make or attempt to make discoveries in said arts or improvements in any of the instruments or apparatus used in connection therewith, nor was he under any contract or obligation, express or implied, which required him to make or patent, or turn over to said company or any person or corporation, for its use or otherwise, any improvements or discovery or patent that he might claim therefor, or to give to such corporation, or to any person or corporation, for its use, the benefit of any

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discovery or patent which he might obtain therefor in either of said arts, or in or to any instrument or appliances required for, or capable of use in connection therewith, but by the terms of his employment he was at liberty to make and own all such improvements and patents therefor as fully and to the same extent as if he had no connection with said company.

That in October, 1879, he invented what is now known as his improvement in multiple switch-boards for telephone exchanges, and which invention was afterward, to wit, on November, 1884, patented to him, assignor, by mesne assignments to the Western Electric Company, defendant herein.

Your orator further states that the circumstances under which he made an assignment of said inventions to the first named defendant, were as follows: He had, prior to April 5, 1881, five applications pertaining to his improvements in telephony pending in the United States Patent Office, and in all of which George P. Barton, who was and is the patent solicitor of said company and is now the attorney of said defendants, was his attorney of record duly appointed by him as such by written powers of attorney, filed in the patent office with said applications; that in April, 1881, said Barton prepared an assignment of applications to the Western Electric Manufacturing Company, which your orator signed and gave back to said Barton, expecting to receive reasonable compensation for said patents from said company, and executing and delivering the same, relying upon that understanding that had been induced from the fact that the executive officers and representatives of the majority of the stock of said company had determined upon the policy of obtaining control of all telephone patents within their ability or power, in order that they might build up a large and successful business for said company, and to that end had theretofore instructed your orator as superintendent to pursue that policy and purchase all such patents which, in the opinion of the managing officers of said company would probably prove advantageous to that end.

Your orator, therefore, when said attorney asked him to assign said pending applications, did so, fully understanding and believing that he would be adequately compensated for the same; all of which said company and its managing officers well knew, and accepted said transfer with that understanding. That soon after the making of said assignment your orator stated to General Anson Stager, the then president of the Western Electric Manufacturing Company, that he expected to be allowed reasonable compensation on account of the assignments of his applications (including said multiple switch-board application), but your orator and said officer failed to come to any agreement as to the amount of such compensation; that the invention included in said multiple switch-board application was by far the most important and valuable of the five applications, but that the value of the invention was then uncertain, the claims of the application being then or immediately and for a long time afterward involved in much confusion and doubt; that said Barton also during the same period was engaged in prosecuting an application for one Scribner for a like invention, in which proceedings, as will appear from the record of the patent office, the substantial invention of your orator was, either because the said Barton believed that said invention was in reality the invention of Scribner and not of your orator, or because Scribner's invention had been bought by said company and your orator's invention had not been bought, or through mistake or inadvertence of said attorney, but without your orator's knowledge or consent, disclaimed as the invention of your orator and inserted among the claims of said Scribner, upon learning which your orator interfered and demanded that such disclaimer should be withdrawn, which was done, and upon subsequent adjudication with said Scribner, who was then the paid inventor of said company, having a contract with him by which it was entitled to all inventions by him made, your orator was awarded priority and given a patent embracing the very matter so disclaimed.

Your orator further shows to the court that he was at

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this same period a large stockholder in said company, and believing that the use of said patent by said company would be advantageous to said company and to him, both as a stockholder and owner, did not press the sale thereof while such diverse views existed respecting its value, but allowed said assignment to stand, with such legal or equitable rights to the company and to himself as might result therefrom; all of which the officers and agents of said company well knew, and by their conduct, at least, assented thereto.

That in pursuance of such design the said claim for a patent was prosecuted through the patent office, said company and its successor hereinafter named contributing and paying the attorney's fees and costs thereof, and your orator contributing much time and effort, exceeding many times the value of the expenditures made by the defendants, all of which resulted in the favorable action of the patent office and the issuance of the patent, as hereinbefore set forth.

And your orator denies that at any time it was within the contemplation of your orator, or of any of the officers of said company, that by making said assignment without compensation under the circumstances herein set forth, or allowing said company to retain said title in its name, that your orator made, or intended to make, a gift of such invention to said defendant, or had parted with his title, otherwise than as herein set forth.

And your orator further avers that at the time he made his said invention in multiple switch-boards and filed his application for a patent therefor and executed said assignment to the Western Electric Manufacturing Company, and asked for compensation for the same from the president of the said company, as herein set forth, said defendant was a rival and competitor of the American Bell Telephone Company and other companies and working in opposition to its interests and plans, and that it would have been possible for him, had said company not promised to give him a reasonable compensation and acquiesced to his demand that he should receive such reasonable compensation for his invention, to have made arrangements with other companies

to that end. But in 1884, when the patent was at length awarded to your orator under the circumstances hereinbefore set forth, and after the litigation in the patent office brought about through the action of the said attorney as aforesaid, all these rivals and conflicting interests had substantially been settled through consolidation, contract or otherwise, and the American Bell Telephone Company had secured to itself and to the companies in which it owned a majority of the stock an absolute monopoly in the art of telephony, and it or its related or subordinate companies were, therefore, the only possible purchasers of your orator's patent.

That by this consolidation and arrangement the American Bell Telephone Company became the owner of the majority of the stock in said Western Electric Company, and thereby and through such consolidation of interests the Western Electric Company became the manufacturing company of telephonic instruments and appliances for said Bell company. Your orator, therefore, having no other possible purchaser for said patent, being then a large stockholder in said Western Electric Company, and it being impossible to then determine the value of such invention, owing to its relations with other patents in the same field owned and controlled by that interest, and the then condition of the art of telephony and the uncertainty as to the future use of the telephone, and the cost of maintenance and operation of the same, deemed that it would be best for him to rely upon the understanding that he should receive reasonable compensation for his patent and allow time to determine what such reasonable compensation would be, and has therefore, as he submits he might of right do, awaited the result of events in order that some just basis might be arrived at for the purpose of determining such question of reasonable compensation.

Your orator further states that said defendant, now unjustly taking advantage of the situation, well knowing that it has never paid or rendered any compensation to your orator for or on account of said invention, and that it has

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derived large profits therefrom, now refuses to recognize your orator's interest therein, and seeks to deny him all compensation therefor, all of which conduct is contrary to equity and good conscience.

Your orator avers that the said Western Electric Company, although having full notice as aforesaid, has failed to account to your orator for the large profits which it has made from and on account of its control and possession of said patent, though your orator has requested it to come to an account therein many times since the 23d day of October, 1891, but not before, at about which time he withdrew his offer for sale, and now, greatly to your orator's surprise and disappointment, denies that your orator is the legal or equitable owner of said patent, or entitled to an account of the large profits it has derived therefrom or any part thereof; and the said defendants aver, as the ground of said denial, that your orator's right to said patent, or to an account of the profits arising therefrom, has been lost by laches and barred by the statute of limitations; whereas, your orator is informed and believes he has, and always had, a perfect right to allow said company to hold title in his property by his consent and acquiescence, and that there had never been any adverse holding by said defendants, or either of them, and the use by said defendant was consistent with the interests of your orator and said defendants, and was advantageous thereto, and was never repudiated by said defendants, or either of them, until on or about the 15th day of December, 1891, at about which time your orator, being then for the first time advised that the defendant, the Western Electric Company, denied your orator's interest in said patents as aforesaid, demanded an accounting of all profits, which was refused by said company.

Your orator prays that the said defendant, the Western Electric Company, may be decreed to hold the title to patent No. 308,315 in trust for your orator as the equitable owner thereof; that the said defendants may be decreed to come to account to and with your orator for any and all sums by them, or either of them, due for or on account of

any royalties, license fees, increased profits through manufacturing apparatus and appliances containing or embodying the said invention of your orator, and all other property or gains of every kind and description whatsoever to it accruing by reason of its control, possession and use of said patents and the principles protected thereby and embraced therein, and be required to pay to your orator such of said profits as upon a full account and examination of the facts may seem to the court equitable and just.

And may it please your honor to grant all such other and further relief in the premises as may be in accordance with equity.”

A demurrer to the bill having been sustained, the complainant has appealed to this court.

CHARLES H. ALDRICH, attorney for appellant.

WILLIAMS, HOLT & WHEELER, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The bill filed by appellant is based upon the idea that appellees took title to the patent mentioned, under an implied trust to hold the same and account to appellant for profits derived therefrom. There is nothing that amounts to a charge of an express or agreed trust. The allegation that the complainant assigned the patent, fully understanding and believing that he would be adequately compensated for the same, and that the company knew this and accepted said transfer with that understanding, is, in the absence of any setting forth of what the actual written assignment was, or any statement that there was anything more than a mere mental understanding, not a charge of an express trust.

Was there an implied trust? The bill sets forth that the attorney of the company “prepared an assignment of applications to the Western Electric Manufacturing Company, which your orator signed and gave back to said Barton, ex-

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pecting to receive reasonable compensation for said patents from said company, and executing and delivering the same, relying upon that understanding, that he was to receive reasonable compensation from the company, that had been induced from the fact that the executive officers and representatives of the majority of the stock of said company had determined upon the policy of obtaining control of all telephone patents within their ability or power, in order that they might build up a large and successful business for said company, and to that end had, theretofore, instructed your orator as superintendent to pursue that policy and purchase all such patents which in the opinion of the managing officers of said company would probably prove advantageous to that end.

Your orator, therefore, when said attorney asked him to assign said pending applications, did so, fully understanding and believing that he would be adequately compensated for the same; all of which said company and its managing officers well knew and accepted said transfer with that understanding."

It thus appears that complainant's understanding that he would be adequately compensated for assigning his applications for patents, was based upon his knowledge of the policy, determined upon by the company, to obtain control of telephone patents, and its instructions to him to purchase such patents, and not upon any holding out or promise made to him.

The bill also sets forth a reason operating upon his mind inducing the assignment, and explaining the manner in which he expected to derive benefit therefrom, in the following allegation :

"Your orator further shows to the court that he was at this same period a large stockholder in said company, and believing that the use of said patents by said company would be advantageous to said company and to him, both as a stockholder and owner, did not press the sale thereof while such diverse views existed respecting its value, but allowed said assignment to stand, with such legal or equitable rights

to the company and to himself as might result therefrom; all of which the officers and agents of said company well knew, and by their conduct, at least, assented thereto."

There is in the bill no charge that there was an agreement or understanding that the company should account to him for use or profits; the charge is that the company knew that complainant understood "that he would be adequately compensated for the same" (that is, for the assignment of an application for a patent), as the bill charges, of "then uncertain value." The charge is not that the complainant understood that the company would hold the patent in trust or account to him for profits. If any cause of action is shown by the bill, it is in assumpsit for the value of the assigned application at the time of the assignment.

Waiving other consideration, we are of the opinion that the complainant has been guilty of such laches as warrants a refusal by a court of equity to entertain his claim. The assignment appears to have been made in April, 1881; soon afterward complainant attempted to come to an agreement with the company for a reasonable compensation on account of the assignment, and failed.

October 23, 1891, he first asked the company to account for profits. December 15, 1891, it refused; and February 20, 1894, he filed his bill.

An absolute assignment in 1881, of an application of uncertain value, which, it is charged, has since come to be of great value, is asserted, in 1894, to have been the creation of a trust to pay the expenses of obtaining, holding, managing and to account for profits of an expected patent.

"The statute of limitations is not necessarily controlling as to the time within which relief is to be sought in the case of a constructive trust by reason of fraud. A demand may be stale and not entitled to relief under the circumstances of the case, although much less than the time allowed by the statute of limitations has elapsed; and so a party may be entitled to relief, although much more than the statute limit has gone by. * * * If a party has knowledge of the fraud, a want of evidence will not excuse his delay, nor

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will poverty and an inability to prosecute the action. If there has been great delay, the courts will require very clear evidence to impeach a transaction as fraudulent, and to convert the fraudulent party into a trustee." 1 Perry on Trusts, 3d Ed., Sec. 230; Pratt v. California Mining Co., 24 F. Repts. 869; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; 12 A. & E. Ency. of Law, 546.

In Castner v. Walrod, 83 Ill. 171, the court said :

" A court of equity will, however, often treat a lapse of a less period than that provided in actions of law as a presumptive bar, on the ground of discouraging stale claims or gross laches, or unexplained acquiescence in the assertion of an adverse right. 2 Story, Eq. Jur., Sec. 1520. * * * If fraud had been established, that can not be held a sufficient excuse for the laches of the complainants." * * *

The case of Cox v. Montgomery, 36 Ill. 396, was a bill in equity to avoid a contract for the exchange of lands on the ground of fraud. The proof established the existence of fraud, but in deciding the question in regard to time in which a bill was filed, it was said : " This species of remedy must be invoked with reasonable diligence. In a country where the value of real estate changed as rapidly as in Illinois, it would be clearly unwise to permit a purchaser of land to retain it for nearly eighteen months after the discovery of the fraud before filing his bill to rescind. This is an unreasonable delay which a court of chancery can not tolerate."

The decree of the Superior Court is affirmed.

Oscar Hagerstrom, by his Next Friend, etc., v. West Chicago Street R. R. Co.

1. ORDINARY CARE—*Persons in Peril*.—A person, in the presence of imminent danger to his person, is not required to act with all the care and caution that might reasonably be required of him under ordinary circumstances, and it is for the jury to say whether he acted with undue rashness in his attempts to escape from the known peril that confronted him.

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2. PRACTICE—*Taking the Case from the Jury*.—In an action for personal injuries, the question of whether there was contributory negligence by the person injured is one of fact for the jury and not of law for the court; where the evidence shows such a degree of contributory negligence on the plaintiff's part as would require the court to set aside any verdict he might recover, it would be proper to take the case from the jury.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed November 5, 1896.

A. B. CHILCOAT and BLACK & FITZGERALD, attorneys for appellant.

“Persons under imminency of peril may not be required to exercise all the presence of mind and care ‘of a prudent, careful man,’ with impending danger. The law makes allowance and leaves the circumstances to the jury to find if the party acted rashly and under an undue apprehension of danger.” *Galena and Chicago Union Railroad Company v. Yarwood*, 17 Ill. 509.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellee.

“When a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show, not only negligence on the part of the defendant, but also that he exercised proper care and circumspection, or, in other words, that he was not guilty of negligence.” *Cothran v. Ellis*, 125 Ill. 496; *Comm. Ins. Co. v. Scammon*, 123 Ill. 605; *Hinckley v. Horasdowsky*, 133 Ill. 364; *Bartelott v. Int. Bank*, 119 Ill. 271, 272; *Simmons v. R. R. Co.*, 110 Ill. 346; *Ry. Co. v. Coble*, 113 Ill. 117; *Frazer v. Howe*, 106 Ill. 573, 574; *Ry. Co. v. O'Connor*, 115 Ill. 261; *R. R. Co. v. Adler*, 129 Ill. 339; *People v. Ins. Ex.*, 126 Ill. 468, 469; *Randall v. R. R. Co.*, 109 U. S. 478.

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MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit by appellant to recover for personal injuries sustained by him.

At the conclusion of plaintiff's case, the court took the case from the jury by a peremptory instruction to find for the defendant, and a verdict being so returned and judgment rendered thereon, this appeal is prosecuted.

The facts shown are that the plaintiff, then twelve or thirteen years of age, when returning from school jumped upon a projection from the rear end of one of the defendant's street cars, and while hanging on, as he testified, rode about the length of the car, when the conductor came out and spit at him and "made a punch" at his face, whereupon he jumped off. At that instant another car, drawn by horses on a parallel track, was approaching from the direction opposite to that in which the car upon which he was riding was going, and as he jumped off he staggered and ran upon the other track, or close to it, and was struck by the approaching horses, knocked down, and most severely hurt.

It was an instance of what boys call "hitching," and it is not denied that appellant was a trespasser when upon the car.

The appellee insists that the evidence in behalf of the appellant shows that the injury was attributable to the contributory negligence of the appellant to such an extent as to preclude a recovery.

The question of whether there was contributory negligence by the person injured, is, as is the question of whether the one doing the injury was guilty of negligence, one of fact for the jury, and not one of law for the court. Of course, if the case as made by the plaintiff showed such a degree of contributory negligence by him as would require the court to set aside any verdict which he might recover, then it would be proper to take the case from the jury.

But a careful consideration of the testimony makes it quite clear that there was evidence tending to establish due care on the part of the plaintiff.

A person in the presence of imminent danger to his person is not required to act with all the care and caution that might reasonably be required of him under ordinary circumstances, and it remains for the jury to say whether he acted with undue rashness in his attempt to escape from the known peril that confronted him. *Dunham T. and W. Co. v. Dandelin*, 143 Ill. 409; *West Chicago St. Ry. Co. v. McNulty*, 64 Ill. App. 549.

We do not discover in appellee's brief that any serious question is made but that there was evidence tending to establish negligence on the part of appellee.

On the question of whether, under the proved facts, the appellee was guilty of negligence, we refer to *North Chicago St. Ry. Co. v. Gastka*, 128 Ill. 613, which is almost precisely in point.

The judgment of the Superior Court will accordingly be reversed and the cause remanded.

Illinois Steel Company v. John Mann.

1. MASTER AND SERVANT.—*Reliance by the Servant upon Promises of the Master.*—When the danger of a service is increased by the machinery becoming unprotected, either by accident or from any other cause, the servant complains and the master promises that the protection shall be restored, it must be considered that the master takes upon himself the responsibility of any accident that may occur during the period.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 5, 1896.

E. PARMALEE PRENTICE, attorney for appellant; WILLIAMS, HOLT & WHEELER, of counsel.

Even a promise to repair does not relieve an employe from the assumption of hazard where the danger arises from the

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ordinary use of familiar agencies. *District of Columbia v. McElligot*, 117 U. S. 621; *Bailey on Master's Liability*, 209, 210, 211; *Marsh v. Chickering*, 101 N. Y. 396; 5 N. E. Rep. 56; *Corcoran v. Gas Light Co.*, 81 Wis. 191; 51 N. W. Rep. 325; *Gowen v. Harley*, 56 Fed. Rep. 973; *Tuttle v. Railway Co.*, 122 U. S. 189; *Richards v. Rough*, 53 Mich. 212; 18 N. W. Rep. 785; *Hayden v. Mfg. Co.*, 29 Conn. 548.

A definite promise relied on for a reasonable time does not absolutely relieve plaintiff from the assumption of hazard as a matter of law, but raises a question for the jury, which in this case the court refused to submit to the jury and ruled as a matter of law. *Anderson Pressed Brick Co. v. Sobkawiak*, 148 Ill. 573; *Counsell v. Hart*, 145 Mass. 468; *Beach on Contributory Negligence*, Sec. 372, note 3; *District of Columbia v. McElligot*, 117 U. S. 621; *Gulf, etc., R. R. Co. v. Donnelly*, 70 Tex. 371.

GEORGE B. FINCH, attorney for appellee.

It is the implied duty of the master to provide reasonably safe tools and appliances for the use of his servants, and also a reasonably safe and proper place for the servants to perform their work. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Hess v. Rosenthal*, 160 Ill. 162; *C. & N. W. Ry. Co. v. Swett*, 45 Ill. 197; *C. & N. W. Ry. Co. v. Jackson*, 55 Ill. 492; *M. & O. R. R. Co. v. Godfrey*, 155 Ill. 78; *I. & St. L. R. R. Co. v. Whalen*, 19 Ill. App. 116; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Pa. Co. v. Lynch*, 90 Ill. 333; *Fairbanks v. Haentzsche*, 73 Ill. 236.

In case a servant discovers that his employment has become more than ordinarily dangerous through defects in machinery or appliances used in the work, or in the place provided by the master in which to do the work, whether the defect is the result of accident or decay, it is the servant's duty to notify the master of such increase of danger and quit the employment unless the master promises to remedy such defect, and, if he does so promise, the master thereby takes upon himself the responsibility of any accident caused by such defect. *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was in the service of the appellant, and the place where he worked as a heater in a rolling mill was upon a floor of cast iron plates in front of a furnace. Under the influence of damp earth underneath and heat above, the plates warp, the edges become lower than the middle, and the plates, especially in the middle, by wear become very smooth. That the floor was dangerous for the appellee to work upon is not denied, but it is said that it was impossible to make it otherwise. Of that assertion there is no proof. It is only proved that with such plates as were used, and a leaky roof overhead, the floor could not be kept level. There is no evidence of whether better conditions might have brought better results.

- The appellee fell on the floor and sustained very severe injuries. He sued and has recovered. The amount of the recovery is not in question.

The ground upon which he recovered, is, that the foreman had promised to fix the floor, and we take from the brief of appellant what the appellee does not dispute:

“Plaintiff says that he had frequently gone to Smith, the foreman, and had told him that the standing was dangerous to work on.

Q. What reply, if any, did he give you? A. Well, he would make an offish reply of some kind, said he would fix it; wait till Sunday.

Q. Did you speak to him more than once about it? A. Oh, yes; quite a number of times.

Q. How long prior to the accident had you spoken to him about it, the last time? A. A couple or three weeks.

Q. What did he say at that time? A. The same old story, that he would fix it Sunday.

Q. Did they fix it? A. Or something of that kind. All the fixing they ever did was just to move the same old plates and put a little dirt under one end, and by the time the week would be out, it would be down again; they never could make it level.

Q. What were the conversations there between you and

Smith, we will take the last one you had with him? A. Well, I couldn't swear what they were.

Q. Well, the substance of them? A. The substance of them was that he could not repair them just at that time, but he would in time; something to that effect; he would see they were fixed.

Q. State whether or not you placed any reliance upon what he said about making repairs there? A. I could not say whether I placed much reliance upon the man's word or not, but I supposed it would be fixed; I did not expect they would keep them plates in that condition much longer."

This is absolutely all the testimony there is in the record on the subject of the supposed promise.

The conclusion of the appellant that "it must be admitted that the testimony is very vague," seems to be just.

We omit consideration in detail of the testimony as to what care the appellee was himself exercising at the time of the accident.

It does not appear in the narrative of his conduct, that there was in it, any want of ordinary care.

The promises were as specific or definite as in *Weber Wagon Co. v. Kehl*, 40 Ill. App. 584, where a recovery was sustained in this court and the judgment affirmed by the Supreme Court in 139 Ill. 644, with the statement that "there was evidence tending to support the allegations of plaintiff's declaration."

As there is in this case no counter evidence, there is no question of preponderance of evidence, and the opinion of the Supreme Court in the *Kehl* case is applicable.

Without further reference to the evidence, we hold that the requests of the appellant for peremptory instructions to find it not guilty upon the several counts of the declaration, were properly refused.

The appellant asked a long instruction, the pith of which is that the appellee was justified in continuing his work upon the floor, after promises to repair, "only for such length of time thereafter as would be reasonably sufficient to enable the" appellant "to remedy the defect."

We understand that the reasonable time is not that in which the repairs could reasonably be made, but such time as it may be reasonable for the servant to rely upon the promise to repair, without being himself guilty of negligence, barring a recovery.

This is the rule explicitly stated in *Counsell v. Hall*, 145 Mass. 468, and printed in italics in appellant's brief.

Indeed, if we follow the words of *Holmes v. Clarke*, 6 Hurl. & Nor. (Exch.) 348, apparently approved the second time by the Supreme Court in *Anderson Pr. Br. Co. v. Sobkowiak*, 148 Ill. 573 (there cited wrongly as from Vol. 7 instead of 6), the rule goes much farther in favor of the servant; for it is there said, "if, during a period when the danger of the service is increased by the machinery becoming unprotected, either by accident or from other cause, the servant complains, and the master promises that the protection shall be restored, it must be considered that the master takes upon himself the responsibility of any accident that may occur during that period."

In effect, the court adopted that doctrine in instructing the jury as follows:

"That if they should find that the foreman of the defendant promised the plaintiff to repair the floor and that by such promise, if they should find the same was made, the plaintiff was led to believe and expect, and did believe and expect, that the said floor would soon be repaired, and that the plaintiff was thereby induced to continue in such employment up to the time he was injured, and further, that while in the exercise of ordinary care for his safety he was injured by reason of the broken, uneven, slippery and dangerous condition of the floor, then you should find the defendant guilty."

We are not satisfied that the instruction is correct; but if it be error, the Supreme Court will detect it.

We do not feel warranted to say that a doctrine apparently deliberately twice sanctioned by the Supreme Court is wrong.

The judgment is affirmed.

Ricketts v. Chicago Permanent B. & L. Ass'n.

J. E. Ricketts v. The Chicago Permanent Building & Loan Association et al.

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67	320

1. COURTS OF CHANCERY—*Jurisdiction in Issuing Writs of Assistance*.—A court of chancery can not, in a proceeding to put a purchaser at a mortgage foreclosure sale into possession, try a question between totally independent titles.

2. EQUITY PRACTICE—*Affidavits, When a Part of the Record*.—Affidavits filed and read in a cause are a part of the record and do not require to be preserved by a certificate of evidence.

3. DECREES AND ORDERS—*Must be Supported by the Record*.—An order or decree in equity must find support and justification either in the facts sufficiently found by it or by evidence appearing in the record, and facts shown by the record can not be overcome by a recital of only a part of them in the order made. The whole record must be looked at.

4. WRITS OF ASSISTANCE—*When Improper to Award*.—When a party does not come into possession of premises *pendente lite*, under any party to the suit, but enters under one who was neither a party nor privy, claiming an independent title to the premises in question, it is error to award a writ of assistance against him.

Foreclosure.—Writ of assistance. Writ of error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed November 5, 1896.

FIREBAUGH & DRAPER, attorneys for plaintiff in error.

DOW, WALKER & WALKER, attorneys for defendants in error.

A writ of assistance is the ordinary process used by a court of chancery to put a party, receiver, sequestrator or other person into possession of property when he is entitled thereto either upon a decree or interlocutory order. Beach, *Modern Eq. Pr.*, Sec. 897.

“An application by the purchaser of land, sold under a decree of foreclosure for the writ of assistance to put him in possession of the land, is not the institution of a new suit, but is auxiliary or incidental to the decree previously entered whereby the rights of the parties have become fixed and determined.” *Vahle v. Brackenseik*, 145 Ill. 231.

VOL. 67.] Ricketts v. Chicago Permanent B. & L. Ass'n.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This writ of error questions an order granting a writ of assistance against the plaintiff in error, who was in possession of certain premises, which had been sold and bid in by the defendant in error, and deeded to it, by virtue of and under proceedings in a foreclosure suit to which the plaintiff in error was not a party.

Although we might regard the affidavit of Marsh, referred to in the order, that Ricketts was in possession of the premises through Draper as agent for Barrett, one of the parties defendant, as being, if not denied, a sufficient justification for the issuance of the rule against Ricketts to show cause why he should not surrender possession, yet when, in answer to such rule, it was shown to be untrue that Draper was agent for Barrett, but that he was agent for one Brown, who was the owner of an independent title to the premises, which had been acquired through a sale of the premises for taxes, and a tax deed thereof issued by the County Clerk to Brown's grantor, neither Draper nor Brown, nor Brown's grantor, being a party to the foreclosure suit, nor coming in *pendente lite* under anybody who was a party—quite other considerations arose.

It was made to appear that Ricketts held possession under one holding a tax title, which, if valid, would be paramount to the mortgage and everybody claiming through it; and the chancery court could not, in a proceeding to put a purchaser at the mortgage foreclosure sale into possession, try a question between totally independent titles, such as was thus presented. *Harding v. LeMoyne*, 114 Ill. 65.

But it is said by defendant in error, that the insertion into the record of the affidavits and lease read upon the hearing of the application for a rule to show cause, was without lawful sanction.

The rule in chancery is, that affidavits filed and read in a cause are a part of the record, and do not require to be preserved by a certificate of evidence. *Dilworth v. Curts*, 139 Ill. 508.

Again, it is said by defendant in error that the granting

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of the writ rested in the sound discretion of the chancellor, and that the presumption that he wisely exercised his power in that regard, stands un rebutted. Whether such presumption is rebutted or not, depends upon what the entire record shows. Where the record contains evidence which establishes with certainty facts that show affirmatively that the order was an improvident one, the effect of such facts can not be overcome by a recital of only a part of them in the order made. The whole record must be looked at.

It is familiar doctrine that an order or decree in equity must find support and justification, either in the facts specifically found by it, or by evidence appearing in the record. *First Nat. Bank v. Baker*, 161 Ill. 281; *Adair v. Adair*, 54 Ill. App. 502; *Baird v. Powers*, 131 Ill. 66.

Although had there been nothing in the record except the affidavit of Marsh, it being recited that for what was thereby made to appear, the order was granted, we might say there was sufficient justification for awarding the writ of assistance, yet, it appearing from the other evidence, not denied, in the record, that an entirely different state of facts existed, and that Ricketts did not come into possession *pendente lite* under any party to the suit, but entered under one who was neither a party nor privy, claiming an independent title to the premises involved, we think it was clear error to award the writ. *Terrell v. Allison*, 21 Wall. 289; *Howard v. Railway Co.*, 101 U. S. 837 (849); *Frelinghuyzen v. Colden*, 4 Paige Ch. 204; *Van Hook v. Throckmorton*, 8 Paige Ch. 33.

The decree awarding the writ of assistance must, therefore, be reversed and the cause remanded.

Tilton H. McCormick v. John W. Buehler.

1. MORTGAGES—*Assignable—Subject to Equities.*—While a promissory note, if assigned in good faith, and for value, before it comes due, is divested in the hands of the assignee of any equities existing between the maker and the assignor, a mortgage given to secure such a

67	73
169	269

67	73
104	1240

note is not assignable except in equity, and when assigned is subject to whatever equities existed between the assignor, and the maker of the note which the mortgage is given to secure, at the time of the assignment of such note.

Bill of Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Reversed and bill dismissed. Opinion filed November 30, 1896.

STATEMENT OF THE CASE.

This is an appeal by the principal defendant, from a decree of foreclosure entered in the Circuit Court of Cook County. On March 27, 1893, appellant bought the premises in controversy from one William J. Haerther, and thereupon gave his note for \$820, secured by a trust deed upon the premises, as part payment therefor. The note was due one year after date, and was drawn to the order of appellant, and by him indorsed and delivered to William J. Haerther. The trust deed was made to Calvin K. Austin, as trustee.

On April 25, 1893, a month after the note was executed, appellant made a payment of \$300 thereon to William J. Haerther, which was duly credited on the back of the note. On May 16, 1893, twenty-one days after the first payment, he made another payment of \$100, and took Haerther's receipt therefor, and two or three days after this second payment he turned over to Haerther a certificate of deposit upon the Milwaukee Avenue State Bank for the sum of \$515, as payment in full of the balance upon the note, together with interest, and interest upon another note.

Appellant did not, at the time of making this last payment, ask for a return of the note or trust deed, and did not obtain a receipt, but relied upon Calvin K. Austin, and the trustee under the trust deed, to get the note for him and release the trust deed. Soon after this last payment, Austin, who had occupied the same office with Haerther, moved out of the office, whereupon appellant commenced efforts to obtain the notes or a receipt in full. Haerther was

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hard to find, and kept putting appellant off until September 28th, when he gave appellant a receipt in full on account of the note and interest.

On May 29, 1893, at least ten days after the last payment had been made in full of principal and interest on said note, Haerther executed a collateral note to the Garden City Banking & Trust Company, of which appellee was at that time and still is the cashier, and delivered appellant's note, among others, to the bank as collateral security. Said bank held the collateral until July 20, 1895, when appellee bought it at public sale.

Prior to the sale of this note by the bank, notice was served upon the Garden City Banking & Trust Company that the note had been paid in full, and demand made upon it to surrender the note and trust deed. It is admitted by appellee's solicitors that appellee is entitled in this suit to only such protection as would be afforded to the bank had it retained possession of the securities and filed the bill to foreclose.

On March 16, 1896, about eight months after this purchase by appellee, he instituted foreclosure proceedings, and after a hearing before the master, and upon the overruling of the exceptions to the master's report, a decree of foreclosure was entered, from which decree this appeal is prosecuted.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant.

GOLDZIER & RODGERS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

By the common law, choses in action were not assignable, and consequently the purchaser of a chose in action could not enforce the same in an action at law in his own name. He did acquire an equitable right thereto, which a court of equity would enforce, but subject to all equities existing between the assignor and the debtor.

Following this rule, the Supreme Court of this State, in the case of *Olds v. Cummings*, 31 Ill. 138, held that the assignee of a mortgage takes it subject to the infirmities and defenses to which it was subject in the hands of the assignor. A mortgage is but an incident or accessory to the debt which it is given to secure. If such debt be represented by a promissory note, which is in good faith, for value, assigned before it comes due, the assignee of such note takes it divested of any equities as to the same existing between the maker and the assignor, because what is known as negotiable instruments are not only assignable by virtue of the law merchant, but by the statute of this State; as a mortgage, an accessory or incident to a note is not assignable, the purchaser of a note, when he comes to foreclose the mortgage, although by his purchase, as such incident, it passed to him, may be confronted by and holds the mortgage subject to whatever equities, at the time of the assignment of the note, existed between the maker and the assignor. Such ruling in *Olds v. Cummings*, has been affirmed in *Walker v. Dement*, 42 Ill. 272; *Sumner v. Waugh*, 56 Ill. 531; *White v. Sutherland*, 64 Ill. 181; *Bryant v. Vix*, 83 Ill. 11; *C., D. & V. Ry. Co. v. Lowenthal*, 93 Ill. 433; *Foster v. Strong*, 5 Ill. App. 223; *Towner v. McClelland*, 110 Ill. 542.

The rule of this State is in this regard, variant from what it is in almost all the other States of the Union. 15 Am. & Eng. Ency. of Law, 854; *Jones on Mortgages*, 5th Ed., Sec. 834; *Carpenter v. Longan*, 16 Wallace, 271.

In most of the States of the Union it is held that a mortgage, being but an incident of the debt, can have no separate existence; that when the debt is paid, the mortgage expires; that the dependent and incidental relation of the mortgage is the controlling consideration, and that thereby the case of a mortgage is taken out of the rule applicable generally to choses in action where no such state of dependence exists; that the principle *accessorium non ducit sequitur principale* applies.

As to the rule now under consideration, that the assignee

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of a mortgage takes it subject to all the equities of the mortgagor, there is no distinction between trust deeds and mortgages; each is but an incumbrance, and each is, in common parlance, properly termed a mortgage. Nor is there any distinction between mortgages made to secure notes payable to a particular person, and mortgages made to secure notes payable to bearer or to the order of the payor, and by him indorsed. Randolph on Commercial Paper, Secs. 153, 159; 1 Daniel on Negotiable Instruments, 4th Ed., Sec. 729.

We do not regard the case of *Miller v. Larned*, 103 Ill. 562, or *P. & S. R. R. Co. v. Thompson*, 103 Ill. 187, as, so far as this case is concerned, affecting the rule enunciated in *Olds v. Cummings*, *supra*.

The note, to secure which this mortgage was given, having been paid prior to the assignment of the note by the holder, neither the assignee nor the complainant acquired, as against the mortgagor, any right to or interest in the mortgaged premises.

The decree of the Circuit Court is therefore reversed, and a decree will here be entered dismissing the bill for want of equity.

Reversed, and bill dismissed.

67	77
118	2471

Margaret Swan v. Michael H. Mulherin.

1. JURY TRIAL—*Application of the Act of 1893*.—The act of June 17, 1893, providing for a trial by jury in cases where the judgment may be satisfied by imprisonment, applies to all cases, whether in justice's courts or courts of record, where a judgment may be satisfied by imprisonment.

2. SAME—*Waiver of*.—Under the act of June 17, 1893, providing for a trial by jury in cases where the judgment may be satisfied by imprisonment, a jury trial can be waived only by the defendant executing a formal waiver in writing; a submission of the cause by the parties to the court without a jury is not sufficient.

3. CONSTRUCTION OF STATUTES—*Will of the Legislature*.—The grand object in construing statutes is to ascertain the will of the legislature,

and to accomplish this, courts will not only look to the language of the whole act, but to the law as it was at the time of the passage of such act, to the cause and motive of the act and the mischief to be remedied or avoided thereby.

Motion, to quash execution. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

E. A. SHELBURNE, attorney for plaintiff in error.

MAX ROBINSON, attorney for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In an action of trespass *de bonis asportatis*, the plaintiff recovered a judgment for \$165.40 against the defendant in the Circuit Court, and, later, the defendant was arrested on a *ca. sa.* and confined in the county jail.

Upon an application, afterward made, the Circuit Court quashed the *capias*, and the sole question here is, was such action right.

It is conceded that the action of the court in quashing the *capias* was based upon the act, approved June 17, 1893, to be found in the Laws of 1893, p. 96 (State Ed.), entitled, and as follows:

“An act to provide a trial by jury in all cases where a judgment may be satisfied by imprisonment.

Section 1. Be it enacted (etc.), that no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi-criminal or *qui tam* action, except upon conviction by jury. Provided, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing; and provided further, that this provision shall not be construed to apply to fines inflicted for contempt of court; and provided further, that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by a jury.”

See, also, for the act, Sec. 631, Ch. 38, entitled “Criminal

Code," 1 Starr & Curtis' (2d Ed.) Annotated Statutes, and also Sec. 175, Ch. 79, entitled "Justices and Constables," Hurd's Ed., Rev. Stat. 1895.

It is contended by plaintiff that the act applies only to justice's courts, and secondly, that if it applies to courts of record, there was a compliance with its provisions, because the record shows that "the parties in open court submitted the cause to the court for trial without a jury."

There is no ground for the contention that the act has application only to cases before justices of the peace. It applies, by its very terms, to "all cases (whether in justice's court, or a court of record) where a judgment may be satisfied by imprisonment."

Nor do we think that a record that "the parties submitted the cause to the court for trial without a jury," is a substantial compliance with the statutory requirement that a jury trial may be waived only by the defendant executing a formal waiver in writing.

It was the law before the act, that both parties might waive a jury in such cases, and when the legislature said that it should no longer be, unless the defendant executed a formal waiver in writing, it will be presumed that, in the view of the legislature, a mischief existed that needed to be remedied, and that the new legislation in such behalf was directed at the mischief and intended to remedy it. Courts, therefore, should not give such a construction to the legislation as would nullify it, except for very grave reasons.

"The grand object in construing statutes is to ascertain the will of the legislature; and to accomplish this, courts not only will look to the provisions and language of the whole act, but to the law as it was at the time of the passage of such act, to the cause and motive of the act, and the mischief to be remedied or avoided thereby." *Zarreseller v. The People*, 17 Ill. 101; *Stribling v. Prettyman*, 57 Ill. 371,

The Circuit Court could, with regard for the statute, do no less than quash the writ, and the judgment is accordingly affirmed.

Berit Jorgenson v. Johnson Chair Co.

67	80
169	489

1. ORDINARY CARE—*What is Not an Exercise of.*—A person employed to perform a particular service about a building at night, who ventures into an unfamiliar part of the building, not lighted, and, groping about in the dark, falls down a shaft and is injured, is not exercising ordinary care.

Action for Personal Injuries.—Error to the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

STATEMENT OF THE CASE.

Plaintiff in error was a servant employed by the defendant corporation to scrub its office floors. The defendant's place of business was located at 225 North Green street, Chicago, fronting west on Green street, the building consisting of five stories, constituting one of the largest chair factories in the country. The first floor above the basement was used as a shipping room and as offices. These offices, five in number, fronted on Green street, a partition of wood and glass separating them from the shipping room. A door opened out of the offices into the shipping room, so that one coming out of the office door would be fronting east. A freight elevator shaft extended from the basement up through the shipping room and the stories above, up and down which shaft an elevator platform plied, as occasion required, in the hoisting and lowering of merchandise. The dimensions of the elevator were six by eight feet. There was no opening or doorway from the shipping room into the elevator shaft, the entire width of the shaft. There was no door, or gate, or guard to the opening from the shipping room into the shaft other than a two-by-four scantling across the whole width of the opening, kept in place by a groove in each end, in which it ran, and was operated up and down by means of a weight attached to a cord. By this contrivance the bar was permitted to descend within

two and one-half or three feet of the shipping room floor, and could be elevated to six and one-half feet above the shipping room floor. The opening into the elevator shaft from the shipping room floor was about thirty feet from the office door, a little to the left. Near to the left side of the elevator was a box in which pieces of cloth, called burlaps, were dumped, an article used in manufacturing and packing chairs and other furniture by defendant. Pieces of burlaps were usually left on the floor near the box. These five offices were used as the business offices of defendant, and were scrubbed every second Monday evening after the business of the day was over.

On the evening of the 9th day of May, 1892, plaintiff in error, at about half past six or seven o'clock, entered the offices by the Green street entrance for the purpose of scrubbing the office floors, a service which she had been performing for the defendant for a period of eighteen months, next previous to that evening. Another woman, by the name of Bergitha Johnson, was also employed by defendant to assist in scrubbing and cleaning the offices, and had been so employed for about six months. The offices were lighted by gas. There was no light in the shipping room on this evening, except such as shone dimly through the office partition windows, and a small gas jet dimly burning over a sink at the right hand of the office door in the shipping room and close up to the partition. By the oral contract of employment, the defendant was to furnish plaintiff with the necessary implements or tools, such as hot water, soap, pails and cloths to scrub and wipe up the floor. Plaintiff in error, after having scrubbed one of the offices, needing more hot water, sent the night watchman for hot water, and also needing rags with which to wipe up and dry the office floor, to obtain some burlaps for that purpose, she went out of the office door to the place where the burlaps were kept, and, she claims, not knowing that there was an elevator shaft there, in her endeavor to find burlaps, fell down the elevator shaft, a distance of about twelve feet, striking on the ele-

vator platform which was resting in the basement, receiving the injuries complained of in the declaration.

The negligence alleged in the declaration is, that defendant in error carelessly, wrongfully and negligently permitted the opening into the elevator shaft to be unguarded, unprotected and unlighted, and to remain in a dangerous condition, although it well knew that the servants employed by it to scrub and clean out said rooms, would necessarily be required to be and remain there upon said premises after daylight, and perform the services required of them by artificial light.

The judge of the Circuit Court, at the conclusion of the plaintiff's case, instructed the jury to find for the defendant.

From the judgment entered upon a verdict rendered in pursuance of such instruction, the plaintiff prosecutes a writ of error.

DOW, WALKER & WALKER, attorneys for plaintiff in error.

RICHOLSON, MATSON & DRAKE, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

If it had been the practice of the plaintiff to go for bur-laps to the box by the side of the elevator shaft, then she knew of the existence of such shaft.

If she had ever before gone to such box, there is in the record nothing to show that the defendant had any reason for thinking that she would do so on the night she was injured, and consequently no notice that it was necessary to guard the shaft so that she could not fall down the same.

The shipping room through which the shaft ran, was not a part of the territory where she worked. It was not lighted at night, and in venturing into this, as she claims, to her unfamiliar part of the building, and groping about in the dark, in a chair factory, the plaintiff was not exercising ordinary care.

The judgment of the Circuit Court is affirmed.

Stockham v. Simmons.

William H. Stockham, Impleaded, etc., v. John J. Simmons.

1. **STATUTES OF OTHER STATES—*Must be Plead.***—The courts of this State do not take judicial notice of the statutes of other States, and when a party relies upon such a statute he must plead it, and its terms so far as relied upon must be set forth.

2. **PRACTICE—*Mistake in an Affidavit, When Objectionable.***—A copy of an affidavit asking to have a suit placed upon the short cause calendar need not be served with the notice required by the statute, and a mistake in such an affidavit so served, is not ground for complaint, unless some one has been injured thereby.

Assumpsit, on a promissory note. Error to the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

RANDALL W. BURNS and LEON L. LOEHR, attorneys for plaintiff in error; RICH & STONE, of counsel.

HECKMAN & ELSDON, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The defendant in error sued the plaintiff in error upon a promissory note made by the plaintiff in error, and Adele A. and Bird Bickford. The Bickfords were not served with summons. The plaintiff in error pleaded that the note was executed and delivered in Indiana; that the plaintiff in error was only surety for Adele, as the defendant in error knew at the time, and that "by the laws of the State of Indiana, and by force of the statutes of Indiana in such case made and provided, to wit, sections 738-9 of the Revised Statutes of 1881, or Burns' Indiana Statutes, sections 1212, 1213, the property of a surety upon a note or contract can not be held liable for the debt until after the property of his principal shall have been exhausted by legal process; that this defendant, William H. Stockham, before and after the commencement of this suit duly notified and requested the

said plaintiff to take legal proceedings against his said principal, Adele Bickford, and to exhaust her property before taking proceedings against him for the collection of said note."

The argument that this plea is of any avail under Sec. 1, Ch. 132, Sureties, R. S., must be an afterthought. It does not state, as that statute requires, that the request was "by writing."

Waiving the question whether the Indiana statute affects the right or only the remedy, the plea does not state facts, but inferences. 1 Ch. Pl., 196, Ed. 1828.

What can or can not be done by the statute of another State, is a conclusion from the terms of the statute, and to claim any right under such statute, it must be set out. *Hoyt v. McNiel*, 13 Minn. 390, original edition; 362 Gilfillan edition, and cases there cited.

A demurrer was rightly sustained to the plea. The case was tried, against the exception of the plaintiff in error, upon a "short cause calendar." The objection to such trial was, that the date of the jurat to the affidavit for placing it there, was wrongly stated in the copy served with the notice, upon the attorneys of the plaintiff in error.

The statute does not require that a copy of the affidavit shall be served with the notice.

Had anybody been misled by the mistake, a different question might be presented, but as there is no pretense of that, the mistake was unimportant.

The judgment in favor of the defendant in error is affirmed.

John Wood Todd v. Edward C. Mitchell.

1. FRAUD.—*When Admissible at Law to Impeach a Deed.*—In a trial at law, fraud in the execution of a deed may be given in evidence, but it can not be proved that the transactions which preceded and induced the execution of the deed were fraudulent, and where a party knowingly and voluntarily signs a deed, although he be induced thereto

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69	118

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168	199

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94	549

Todd v. Mitchell.

by the fraudulent contrivances of others, yet if it be such as will convey title it can only be impeached and set aside, and parol evidence received for that purpose in a court of equity, and in the absence of reformation or a setting aside of it for fraud, or other sufficient ground, the terms of the deed must control.

Covenant, for breach of warranty. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice WATERMAN dissenting. Opinion filed November 30, 1896.

MILLARD & ABBEY, attorneys for appellant.

EDWIN WHITE MOORE, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought by appellant as plaintiff, against appellee as defendant, to recover damages for a breach of covenants against incumbrances, contained in a warranty deed of certain real estate in Highland Park, Cook county, made by appellee to appellant in the year 1877.

To the declaration, the defendant pleaded the general issue of *non est factum*, and also special pleas of a release under seal of the cause of action mentioned in the declaration, by the plaintiff to the defendant, executed June 10, 1890, for a valuable consideration.

General replications to the special pleas were filed, and upon issues joined, the cause was submitted to the court without a jury.

After the evidence had been heard, but before judgment, the appellant was given leave to file additional replications, setting up that the pleaded release was obtained by fraud, and averring that the fraud consisted in a concealment by appellee, in collusion with others, from appellant of the existence of the cause of action declared upon, of which they then knew, but he did not, by means of which concealment the appellant, by the appellee and those in collusion with him, was led to believe and did believe, that the re-

lease related only to matters and things involved in a certain chancery suit brought by appellee against appellant on June 3, 1890, and was procured and induced to sign said release.

The breach of covenant that was made to appear, arose from the foreclosure by a trustee's sale, made in 1887, under a "blanket" trust deed in the nature of a mortgage, made by the Highland Park Building Company in 1875, covering the lots in question and other premises, the lien of which was prior to the title of appellee, and of which sale or foreclosure it does not appear that appellee knew until in March, 1890, nor that appellant had personal knowledge until in August, 1893, which was more than two years after the release in question was given.

Besides the transaction concerning the Highland Park lots, the parties seem to have had other relations concerning other real estate, and on said June 3, 1890, when appellant was in Chicago, he being a resident of London, England, the appellee filed a bill in equity for an accounting from him.

The appellant, at that time having trouble with one B. F. Jacobs concerning matters between themselves and others, which was in process of compromise when appellee's bill for an accounting was filed, insisted with Jacobs that before he would go further in the pending negotiations for a settlement of such controversies, he, Jacobs, must procure an acquittance from appellee of all matters involved in his equity suit for an accounting, and for the beginning of which suit, Jacobs testified that the appellant held him responsible.

The result was, that without the personal participation of appellant, except to execute the paper, the following release was executed by both appellant and appellee :

"This agreement and release, made between Edward C. Mitchell, of Chicago, Illinois, and John W. Todd, of London, England, witnesseth :

That, whereas, there is a difference between the parties hereto respecting certain profits in some real estate transactions of said Todd in Chicago, Illinois.

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And, whereas, said Mitchell has lately brought his action against said Todd for an accounting between himself and said Todd;

And, whereas, said parties hereto have compromised said differences :

Now, therefore, in consideration of said differences, and in further consideration of one dollar and other good and valuable considerations passing from said Todd to said Mitchell, and from said Mitchell to said Todd, the parties hereto do hereby forever release and discharge each other from any and all claims, demands, accounting, and from any and all profits, dealings, moneys, or other values whatever. And in consideration aforesaid, do hereby forever release and discharge each other from any and all claims and demands of any name and nature whatsoever which either may have against the other.

In witness whereof, said Edward C. Mitchell and John W. Todd have hereunto set their hands and seals, this 10th day of June, A. D. 1890.

EDWARD C. MITCHELL, [Seal.]
J. W. TODD. [Seal.]”

There does not seem to be much, if any, question but that in the negotiations which ensued between Jacobs and the appellee, and culminated in the release, the question of the liability of appellee to appellant upon appellee's covenant against incumbrances contained in his deed to appellant, was talked of and considered, but from anything contained in this record, whatever the true fact may be, concerning which we should not, in view of other possible litigation between the parties, express an opinion, it is quite plain that appellant did not consider such question, for the reason that he was not actually informed until long afterward, that the title to the premises had failed, and hence did not know that he had any claim, because thereof, against appellee.

Much argument has been made upon the question whether Jacobs was the agent of the appellant in conducting the negotiations which culminated in the execution of the release and the dismissal of the suit in equity brought by appellee

against the appellant, and whether the notice that Jacobs had of the right of action then existing in appellant against the appellee for the breach of covenant declared upon, constituted notice to the appellant which would bind him, but we do not deem it to be necessary to consider those questions, or others to the same point. Nor need we consider as to whether there was, or not, error in excluding offered evidence touching the question of fraud, further than to say that at the time the evidence was offered, there was no issue of fraud presented by the pleadings. It was not until after all evidence was in, that the replications presenting that issue were filed, or asked to be filed, and it would seem that it should not be held to constitute error to exclude evidence that might tend to establish some issue not before the court, when upon the issues, as formed, it was not error.

The majority of the court feel that the case must be decided upon other grounds.

The fraud pleaded by the additional replication consisted in the concealment of a material circumstance known to the appellee, but unknown to the appellant, whereby appellant was induced to execute the release.

Such might be ground in equity for a reformation of the release so as to make it comply with what was in the contemplation of the parties at the time it was executed, or for an avoiding of it entirely. But we regard the release as constituting a perfect bar at law.

“The rule is familiar, wherever the distinction between law and equity is preserved, that in a trial at law, fraud in the execution of a deed may be given in evidence, as that, through misreading, or the substitution of one paper for another, or by other device and trickery, he was induced to seal it, believing, at the time, that he was sealing something else; but it can not be proved that the transactions which preceded and induced the execution of the deed were fraudulent. Where a party knowingly and voluntarily signs a deed, although he do so in violation of his duty and of the laws, or be induced thereto by the fraudulent contrivances of others, yet if it be such, upon its face, as will convey

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title, it can only be impeached and set aside, and parol evidence be received for that purpose, in a court of equity." *Windett v. Hurlbut*, 115 Ill. 403; *Johnson v. Wilson*, 33 Ill. App. 639.

In the absence of reformation, or a setting aside of it because of fraud, or other sufficient ground, the terms of the release must control. So long as it stands, the presumption is, in accordance with inflexible rules, that it speaks the intention of the parties to it, and they can not be permitted to contradict or change it by testifying as to what the intention of the paper was. *Gardt v. Brown*, 113 Ill. 475; *Wood v. Clark*, 121 Ill. 359.

Upon the record as it stands, the judgment of the Circuit Court must be affirmed.

MR. JUSTICE WATERMAN DISSENTING.

It is a familiar rule that the court, in construing an instrument, will place itself in the shoes of the parties by whom it was made, that, viewing the subject-matter from the standpoint which they occupied, it may arrive at a correct understanding of the meaning intended to be expressed by the words made use of.

Applying this rule to the present case, we find that some years prior to the time at which the release under consideration was made, appellee conveyed by warranty deed certain premises to appellant, the title to which afterward failed, leaving appellee liable upon his covenants; that at the time the release in question was made, appellee was aware of such failure, while appellant was entirely ignorant of the same; that one Jacobs, through whose agency appellant had purchased the property in question, was also, and had been for some time, aware of the failure of title to such property, but had failed to inform appellant of the same, and knew that appellant was ignorant in respect thereto.

Jacobs was, just before, and at the time the release was executed, in the midst of transactions with appellant of the greatest importance to him, Jacobs, involving his entire property, so that Jacobs felt it was for his interest, essential

that he should come to an amicable understanding and settlement with appellant. Of this Jacobs informed appellee, and also informed him that because of the suit which appellee had commenced against appellant, appellant was very indignant, and believing that Jacobs had instigated the same, refused to come to any agreement or settlement with him, Jacobs. Jacobs thereon told appellee that he wanted his suit withdrawn, so that he, Jacobs, could settle his own matter with appellant, and finally, to induce the withdrawal of said suit, Jacobs gave to appellee his, Jacobs' note, for \$10,000, as a consideration for the withdrawal of said suit.

Appellant knew nothing about the means resorted to by Jacobs to procure the withdrawal of appellee's suit.

Under these circumstances, with the knowledge on the part of appellee that appellant was entirely ignorant of his just claim against appellee upon his covenants of warranty, the release in question was executed. Prior to the making of this release, appellee consulted his lawyer, Baldwin, as to a release already drawn, asking him if it would cover appellant's claim for the failure of the title to the Highland Park lots. Baldwin advised appellee that it would, but to make sure, drew up a new release, and inserted therein a mutual release clause, advising Mitchell that such clause would cover the liability on the lots. It is apparent that when the last mentioned release was executed, appellee was well aware that appellant did not and could not intend thereby to release appellee from his liability on the covenants contained in his deed for the Highland Park lots, because appellee well knew that appellant was entirely ignorant of the failure of his title to said lots, and the consequent obligation which appellee was under upon his covenants. Appellee executed and obtained this release, fully believing that thereby he was obtaining from appellant that which he had no intention of giving.

Construing the instrument from the standpoint of the parties, the general words of release must be held to include only what the parties, not one of them, who knew that the

other was being deceived, intended, which was to execute a release of the claims which each had in mind, and was informed of. A release, however general in its terms, will be limited to those things contemplated by the parties at the time it is made, and will not be construed to include particular things then unknown and un contemplated. The circumstances surrounding the parties at the time a release is made, are to be kept in view, as well as the purpose for which it was executed. A release will not be construed so as to include rights of which the releasor was ignorant when he executed it. 20th Am. & Eng. Ency. of Law, 745; Addison on Contracts, 8th Ed., Vol. 2, p. 1223; Leake on Contracts, 1st Ed., 925.

The general words of release will be restrained in their effect by the recitals contained in the instrument, as applied to the subject-matter, and this is true at law as well as in equity. *Lyall et al. v. Edwards et al.*, 6 Hurlstone & Norman, 336; Addison on Contracts, p. 1223; *Hazelgrove v. House*, 6 Best & Smith, 975; *Blair v. Chicago & Alton Ry. Co.*, 89 Mo. 383-393; *Payler v. Homersham*, 4 Maule & Selwyn, 423; *Lyman v. Clark*, 9 Mass. 235; *Rich v. Lord*, 18 Pickering, 322.

In *Simons v. Johnson & Moore*, 3d Barnwell & Adolphus, 175, 23 Common Law, 84, the release under consideration was most sweeping in its terms, being "unto the said J. Johnson, his heirs, executors and administrators, and every of them, all and all manner of actions and causes of action, suits, controversies, sums of money, bills, bonds, writings obligatory, accounts, reckonings, damages, judgments, executions, claims and demands whatsoever, both at law and in equity, which against him, J. Johnson, his heirs, executors and administrators, or any of them, or against his, their, or any of their lands, tenements, goods, chattels, or real or personal estate, he, N. Simons, now hath, or he, his heirs, executors or administrators may hereafter claim, for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents."

Yet the court there held that it would look to the recital of the release, and that parol evidence of the nature of the actions mentioned in such recital, was admissible; and so doing, the court found that the release was intended to, and did, apply only to the matter recited, namely, the actions then depending, and that the object of the release was to put an end to them. In the present case, the release contains the following recitals:

“That, whereas, there is a difference between the parties hereto respecting certain profits in some real estate transactions of said Todd in Chicago, Illinois.

And, whereas, said Mitchell has lately brought his action against said Todd for an accounting between himself and said Todd.

And, whereas, said parties hereto have compromised said differences.”

And then goes on to say, that “therefore, in consideration of said differences, and of one dollar and other good and valuable consideration, the parties do release,” etc.

The general words of the release, as appears to me, are restricted by the recitals, they clearly showing what the parties had in mind, and what it was which they intended to release; which construction is in entire accord with the light thrown upon the transaction by a consideration of the circumstances surrounding when it was made. I am therefore of the opinion that certain propositions of law asked by the plaintiff, and refused by the court, should have been held, and that the judgment of the Circuit Court should be reversed and the cause remanded.

**Lake Shore & M. S. Ry. Co., Chicago & N. W. Ry. Co.
and Chicago, M. & St. P. Ry. Co. v. Frank E.
Scott, for use of Lucius B. Mantonya.**

1. GARNISHMENT—*To What a Garnishee May Object.*—A garnishee can object only to such proceedings of the garnishing creditor against the defendant, as affect the jurisdiction of the court over the defendant.

2. SAME—*What Debts May be Reached by.*—A garnishing judgment

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creditor of several joint, who are also several, judgment debtors, has all the rights that either one of such debtors has, and may maintain garnishment proceedings for a debt due to only one of such judgment debtors.

3. *SAME—When Payment Will Not Release.*—Where the original affidavit for garnishee summons set up that the garnishees were “indebted to said defendants,” but was later amended so as to read that the garnishees were “indebted to each of the defendants severally as well as jointly,” *it was held* that payment made after the commencement of the suit, but before the filing of the amended affidavit, did not release the garnishees.

4. *SAME—Objections Waived by Filing Answer.*—The filing of an answer to interrogatories in a garnishment proceeding acts as a waiver of objections that might be made because of inconsistency between the affidavit and the interrogatories.

5. *SAME—Objections to Amount of Judgment, When Allowed.*—A garnishee who has answered that he has paid *pendente lite* all that he owed the judgment debtor can not complain that the judgment entered against him was for the amount due to the garnishing creditor, and not for the full amount originally due to the judgment debtor.

Garnishment proceedings.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

CHARLES B. KEELER, WILLIAM McFADON and ARTHUR W. PULVER, attorneys for appellants.

LEON L. LOEHR and RICH & STONE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the three appellants, severally, upon the same record, from judgments rendered against them, severally, as garnishees, summoned, etc., under the provisions of the garnishment act.

Mantonya recovered a judgment against Scott and Stockton, and, after a return of execution unsatisfied, sued out garnishee process against each of the appellants.

The appellants at first answered, denying any indebtedness to Scott and Stockton jointly, and subsequently, upon being ruled to answer sufficiently (after certain proceedings hereinafter mentioned), answered again, that at

the time of the service of the writ they were severally indebted to Scott individually, and not to Stockton, but had paid Scott in full, between the time of filing their original answers and the time of so answering.

Some question is made because of a claimed defect in both the original and amended affidavits for garnishee summons. A garnishee can object only to such proceedings of the garnishing creditor against the defendant as affect the jurisdiction of the court over the defendant. *Am. Cent. Ins. Co. v. Hettler*, 46 Ill. App. 416.

The defects complained of in no way affected the question of such jurisdiction.

Whether a judgment creditor of two or more joint judgment defendants can maintain garnishment for a debt, due to one of such defendants, is the really meritorious question in the case, and is one that has never been directly decided in this State, so far as we are informed, although it has frequently been held, and is common learning, that the garnishing judgment creditor can have no other or greater rights against the garnishee than the judgment debtor has.

But, as we conceive, it is no more than a legitimate extension of that rule to hold that the garnishing judgment creditor of several joint, who are also several, judgment debtors, may have all the rights that either one of such debtors has. Each judgment debtor is liable to him, and whatever right such individual debtor has, he should have.

Applied to this case, Scott, it is admitted, had a right to the several debts owing to him by each appellant. Scott is severally as much liable to Mantonya as Stockton is, or as both Scott and Stockton jointly are. Why, then, may not Mantonya secure to himself, by a garnishment proceeding, all the rights that Scott had which were subject to such a proceeding? We think he may, no question concerning partnership relations being involved.

In *Drake on Attachment*, Sec. 566, it is said: "Where there are several defendants, the property of each is, of course, liable for the whole debt. In such case, if it appears that the garnishee is indebted to one or more of the defendants, but not to all, he will be chargeable."

It is also said in 2 Wade on Attachment, Sec. 489: "Where there are several defendants, the credits attached may be owned jointly or severally. The garnishees may be one or all indebted to one or all of the defendants. *

* * If a case can be stated in which the judgment recovered against several defendants would only authorize an execution against property owned by them jointly, it will furnish an example where the garnishee, in order to be charged, should be indebted to all the defendants; otherwise, it must be taken as true that a proof of indebtedness as to any one of the defendants, would entitle the plaintiff to judgment against garnishee so indebted."

Another question of importance, arising out of the following circumstances, is presented:

The original affidavit for garnishee summons set up that the garnishees were "indebted to said defendants (Scott and Stockton), or have effects or estate of said defendants in their hands," while the interrogatories to the garnishees inquired as to indebtedness and effects owing and belonging to the defendants, or either of them, jointly or severally.

The original answers responded only to the question of liability to the defendants jointly, and denied any such indebtedness. Exceptions, for insufficiency to such answers, were overruled, and leave was given to amend the affidavit; whereupon, a week later, an amended affidavit was filed, setting up that the garnishees were indebted, etc., to each of the defendants, severally as well as jointly.

Being then ruled to answer the interrogatories, fully and sufficiently, the garnishees, admitting indebtedness to Scott alone, at the time of the service of the writ, and up to the time of filing the original answers, set up that, after such exceptions were overruled and before the amended affidavit was filed, they had each paid such indebtedness in full, and denied any further indebtedness; but the Circuit Court, nevertheless, gave judgment against the garnishees.

We do not think that the garnishees could escape liability by a payment *pendente lite*. By answering, originally, they had waived any objection they might have taken to

the affidavit, or to the interrogatories, because of inconsistency, if any, between them, and it is doubtful if the exceptions to the original answers should have been overruled.

The amended affidavit did not, however, make the suit a new one. As a rule, all amendments relate back to the time of filing the original pleading in the case. No new interrogatories were filed, or required. The garnishees knew from the interrogatories, exactly what they were called upon to answer concerning, and if they paid, relying upon a mere technicality, they did so at their peril.

Another objection is made because the answer of the Lake Shore company showed an indebtedness to Scott in excess of the judgment of Mantonya, and that judgment against that company was entered for only the amount due Mantonya.

While the better practice is, ordinarily, to enter judgment against a garnishee for the full amount of his indebtedness to the judgment debtor, and if that amount exceeds the judgment of the garnishing creditor, to give to him so much of it as will satisfy his judgment, and the balance to the judgment debtor (*Stahl v. Webster*, 11 Ill. 511), yet here the garnishee is not injured in any way by the judgment that was entered, and can not complain of it. The reason for the rule in this case has entirely ceased. By its answer, the Lake Shore company sets up that it paid *pendente lite*, all that it owed to Scott. It can not, therefore, complain because the judgment entered against it was not for more than was due to the garnishing creditor.

Observing no material error in the record, the judgments appealed from are affirmed.

William Hutchinson, by his Next Friend, v. Chicago & A. R. R. Co.

1. REVERSAL—*Where no Reasons will be Assigned.*—Where the reasons for the reversal of a judgment may operate unfairly upon another trial, the court will simply reverse the judgment and remand the cause without assigning reasons therefor.

Ziech v. Hebard.

Trespass on the Case, for personal injuries.. Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded.. Opinion filed November 19, 1896.

JAMES B. MUIR and PECK, MILLER & STARR, attorneys for plaintiff in error.

W. E. HUGHES, and WM. BROWN, general solicitor, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for a personal injury, in which, at the close of the evidence, the court erroneously instructed the jury to find for the appellee.

If we explain why we say erroneously, what we say may operate unfairly upon another trial, and therefore we simply reverse the judgment and remand the cause.

Wilhelm Ziech, Adm'r, v. Frank H. Hebard.

1. NEGLIGENCE—*What Must be Proven*.—An action for negligence is based upon a neglect of duty, and both the duty and the neglect must be proven by the plaintiff.

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Trespass on the Case.—Death from negligence. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

STATEMENT OF THE CASE.

This is an action on the case by appellant for the death of his son, Arthur Ziech, caused by the negligence of the defendant's servants in the handling of furniture which they were delivering for a tenant of appellant. The premises where the injury was inflicted is known as 525 Albany avenue, Chicago. It is a three-story flat-building, facing east, on the

corner of an alley which runs along the south wall of the building. The rear yard is surrounded by a fence with a gate leading from the alley into the yard, through which the furniture in question was taken on the day of the injury. The rear of the building has the customary flat porches with stairs leading from one flight to another, as described in the abstract, and from the top of the third porch there extended west from the building a piece of timber to which was attached a pulley, over which ran a rope, and fastened to one end of the rope was an oak hook. A wagon was driven into the alley beside the gate in question, and two men removed some of the furniture from the wagon, placing it in the yard. Among the furniture was an extension dining table, which they shortly attempted to raise to the third porch of the building by means of the hoisting appliance referred to. A number of children, including the deceased boy, had been playing in the neighborhood, and when they saw the wagon drive up they ran around into the yard to witness the moving. After the table had been attached in some way to the hoisting appliance, one of the men, the second man in the meantime having gone to the third floor, attempted by means of the rope and pulley to hoist the dining table to the third floor of the building. As he was doing this, three of the little boys, including the deceased, stood beside the man and playfully handled the slack of the rope after the same had passed through the man's hands, and in this way the table was raised. It bumped against the porches as it was rapidly raised, and after it had reached the third floor and before the man who was in the third floor flat came out to catch it, the table fell, injuring the three boys who held the rope. Arthur Ziech was so badly injured that he died that afternoon, very shortly after the injury.

The cause came on for trial, and after the plaintiff had closed his case, the defendant made a motion to take the case from the jury, which motion was allowed by the court; under instruction from the court the jury rendered a verdict in favor of the defendant, and from a judgment entered on the verdict this appeal has been taken.

P., C., C. & St. L. R. R. Co. v. Dahlin.

EDWARD E. PERLEY, attorney for appellant.

A. B. JENKS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The record fails to show what negligence, if any, the defendant was guilty of, which resulted in the accident.

The table fell, but that the fall was the result of negligence on the part of the defendant, does not appear.

The action of negligence is based upon a neglect of duty, and both the duty and the neglect must be proven by the plaintiff. R. R. Co. v. Evans, 88 Ill. 63; R. R. Co. v. Mock, 88 Ill. 87; R. R. Co. v. Wellhoener, 72 Ill. 60; Conlon v. Bailey, 58 Ill. App. 261; De La Vergne Refrigerator Co. v. McLeroth, 60 Ill. App. 529; R. R. Co. v. Grimes, 13 Ill. 585; Williams v. R. R. Co., 135 Ill. 491; Joliet Steel Co. v. Shields, 146 Ill. 603; Sack v. Dolese, 137 Ill. 129.

The plaintiff having failed to show that the deceased was injured in consequence of the neglect of the defendant, the jury was properly instructed to find for the defendant.

The judgment of the Circuit Court is affirmed.

**Pittsburgh, C., C. & St. L. R. R. Co. v. Ida Dahlin,
Adm'x.**

1. INSTRUCTIONS—*Undue Emphasis Objectionable*.—An instruction which singles out and calls attention to certain important matters favorable to one of the parties to a suit, and omits to notice most important evidence given by the opposing party, is objectionable.

2. ORDINARY CARE—*Time at Which it Must be Exercised*.—In an action for personal injuries based upon the negligence of the defendant, the question submitted to the jury is not so much what the injured person was doing at the "instant" he received the injury complained of, as under what circumstances he came to be at a place where the injury received was at that place and "instant" inevitable, and an instruction which may convey a contrary impression is bad.

3. PRACTICE—*What Papers Jury May Not Take.*—In an action brought by the administrator of a deceased person for negligently causing the death of such person, when the jury retire to consider as to a verdict they should not be allowed to take with them depositions or a plat attached to a verdict of a coroner's jury, called to consider as to the cause of the death of the deceased, nor should any comments of a coroner's jury upon the situation at the place where the injury was inflicted, or the conduct of the defendant, be considered by the jury or taken to its room.

Trespass on the Case.—Death from negligence. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed November 19, 1896.

GEORGE WILLARD and RICHARD PRENDERGAST, attorneys for appellant.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover pecuniary damages sustained by the death of Gustav A. Dahlin, said to have come to his death through the negligence of appellant.

The deceased was killed at the place where appellant's railway crosses Elizabeth street in the city of Chicago.

There was a verdict and judgment for appellee.

It is insisted by appellant, and evidence was given tending to show that the gates prescribed by city ordinance were down when the deceased entered upon the crossing. If those gates were down, as is testified, the deceased had, before he entered upon the crossing, clear warning of the approach of a train.

The following instruction is objectionable, in that it singles out, and calls attention to, certain important matters favorable to appellee, and omits to notice most important evidence given by appellant.

"2. The jury are instructed, as a matter of law, that both the deceased and the railroad company had an equal

right to cross the street at or about where the accident occurred, and that the law imposes upon both parties the duty of using reasonable and prudent precaution to avoid accident and danger; and while it was the duty of deceased to look out for the approach of cars, and observe all reasonable precaution before attempting to cross the track, it was also incumbent upon the railroad company in detaching a car from the train and sending it down alone, over the crossing in question, to place the same in charge and control of some person with the necessary means of stopping the car, or some one at the crossing to warn passengers of the approach of such car, or to use some other equivalent means sufficient to warn passengers on the street of the approach of such car.

And if the jury find from all the evidence in this case, taken together, that the defendant company did fail to use any such precaution to warn passengers on the street, and that the deceased was exercising such care and caution as an ordinarily prudent man would exercise under like circumstances and surroundings, and that his death was caused by being run over by a car of the defendant company, detached from a train of cars and sent across said Elizabeth street crossing, without any such precaution taken by the railroad company to notify him of the approach of such car, then your verdict should be for the plaintiff."

The question submitted to the jury was not so much what the deceased was doing at the "instant he received the injury causing his death," as under what circumstances it was that he came to be at a place where the injury he received was, at that place and "instant," inevitable.

The following instruction was, therefore, misleading :

- "4. The court instructs the jury that the plaintiff is not required to produce direct and positive testimony showing just what the deceased was doing at the instant he received the injury causing his death; that the law requires only the highest proof of which the particular case is susceptible, and the jury may take into consideration, with other facts, the instincts and presumptions which naturally lead men to avoid injury and preserve their lives."

The jury should not have been allowed to take with them, when they retired to consider as to a verdict, depositions or the plat attached to the verdict rendered by the coroner's jury called to consider as to the cause of the death of the deceased. Nor should any comments of the coroner's jury upon the situation at this crossing, or the conduct of the defendant, have been considered by the jury or taken to its room. *L. S. & M. S. Ry. Co. v. Taylor*, 46 Ill. App. 506.

The judgment of the Superior Court is reversed and the cause remanded.

Harry Ryan v. Philip D. Armour et al.

Theodore P. Siddall, Jr., by his Next Friend, v. Egbert L. Jansen et al.

1. **FORMER DECISIONS.**—Views expressed in 61 Ill. App. 814, 51 Ibid. 74, and 41 Ibid. 279, approved.

Trespass on the Case, for personal injuries. Error to the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN and the Hon. NATHANIEL C. SEARS, Judges, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November, 19, 1896.

KING & GROSS, attorneys for Henry Ryan, plaintiff in error; ANDREW J. HIRSCHL, of counsel.

F. W. BECKER and DALE & FRANCIS, attorneys for Theodore P. Siddall, Jr., plaintiff in error.

CUSTER, GODDARD & GRIFFIN, attorneys for Philip D. Armour et al., defendants in error.

MASON BROTHERS, attorneys for Egbert L. Jansen et al., defendants in error; HENRY B. MASON, of counsel.

Cahill v. McGrath.

OPINION PER CURIAM.

Each of these cases, with the names of the parties reversed, has been here before. 61 Ill. App. 314; 51 Ibid. 74; 41 Ibid. 279.

The cases have now been again tried in accordance with the views of this court heretofore expressed, and still entertained, and therefore the judgments are now affirmed.

Michael J. Cahill v. John J. McGrath.

1. JUDGMENT—*The Result of a Decision by a Court.*—A judgment is always the result of a decision by a court, and is entered against a party *nolens volens*, or because he consents to—confesses—judgment.

2. SAME—*Confession of Indebtedness.*—There is a manifest distinction between confessing an indebtedness and confessing judgment.

Transcript, from a justice of the peace.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard, in this court at the October term, 1896. Reversed and remanded. Opinion filed November 30, 1896.

STATEMENT OF THE CASE.

This was an action commenced in a justice court by summons, returnable January 23, 1896. The case was continued to January 28, 1896, when the parties thereto were present in court. What was the subject-matter of the action, or the evidence therein, does not appear. The justice docket recites as follows:

“Parties present, plaintiff sworn and examined, and defendant confesses and acknowledges that he is indebted to the plaintiff in the amount of one hundred and twenty-five dollars and costs of suit;” then follows an entry of judgment in the usual form.

The defendant took an appeal to the Circuit Court of Cook County. On March 28, 1896, that court, on motion of plaintiff, dismissed the appeal on the ground that an appeal

does not lie from a judgment by confession in justice court, and that this was a judgment by confession.

W. E. KEELEY, attorney for appellant.

MARTIN A. DELANY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The entry in the docket of the justice has none of the elements of a confession of judgment. For a defendant to acknowledge before a justice of the peace, or other court, that he is indebted to the plaintiff in a certain sum, is not to confess or consent to judgment.

A judgment is always the result of a decision by a court, and is entered against a party *nolens volens*, or because he consents to—confesses—judgment.

There is a manifest and wide distinction between confessing an indebtedness and confessing judgment. *Goddard v. Fischer*, 23 Ill. App. 365; *Campbell v. Randolph*, 13 Ill. 313; *Elliott v. Daiber*, 42 Ill. 467.

The judgment of the Circuit Court is reversed and the cause remanded.

James J. Reilly v. Myrtilla Wilkins.

1. MOTIONS—*How Made*.—A motion is properly an application for a rule or order, made *viva voce* to a court or judge; it need not be reduced to writing and filed.

Motion, to open a judgment, etc. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed with directions. Opinion filed November 30, 1896.

BURTON & REICHMANN, attorneys for appellant.

DOW, WALKER & WALKER, attorneys for appellee.

Reilly v. Wilkins.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A judgment against appellant and in favor of the appellee for \$1,099.27, was entered by confession upon a warrant of attorney, contained in a lease of certain premises in Chicago, for a term beginning May 1, 1893, and ending April 30, 1896.

At the same term of court a motion was made to vacate the judgment, but was overruled, and this appeal has followed.

Upon the motion to vacate the judgment, it was made to appear that appellant abandoned the premises because of a claim made by him of constructive eviction therefrom, and that he paid all rent that was due and unpaid up to the date of such abandonment.

The demised premises consisted of a store and basement, to be occupied for the purpose of carrying on a wall paper and decorating business, in a large building, the upper stories of which were divided into flats or apartments.

The constructive eviction was the occupancy of the flats by other tenants of appellee, for immoral purposes—assignation houses and houses of ill fame, with the knowledge of appellee or her agents, and the carrying on of “soliciting” by the female occupants or frequenters of the flats, at the windows of the flats and the street entrances thereto, and upon the sidewalk in front of and adjacent to, the demised store.

It would serve no valuable purpose to review the affidavits *pro* and *con*, that were read on the hearing or the motion. Suffice it to say that we think there was such a showing made as entitled the appellant to have been let in to plead to the declaration upon the merits, and show, if he could, that what he claimed, and upon which he acted, amounted to a constructive eviction.

It is objected by appellee that the record fails to show that any motion was made in the Circuit Court to vacate the judgment.

The judgment was entered April 4, 1896. On the eleventh

of that month there was filed in the cause a duly accepted notice of a motion to be thereafterward made, to vacate the judgment, and that the defendant be let in to plead, and to stay execution until the motion should be disposed of. Two days afterward an order staying execution was entered, and on April 29, 1896, in the order overruling defendant's motion, it was recited that such a motion had been submitted to the court.

A motion need not be reduced to writing and filed. "A motion is properly an application for a rule or order, made *viva voce* to a court or judge." *Washington Park Club v. Baldwin*, 59 Ill. App. 61; *Pick v. Glickman*, 54 Ill. App. 646.

The record shows all that is required.

The order appealed from will be reversed, in so far as it denies the appellant the right to plead to the declaration upon the merits, with directions to the Circuit Court to permit the appellee to so plead, and show, if he can, an eviction from the premises, the judgment itself to stand as security, and abide the result of a trial upon the merits.

No meritorious defense but that of the claimed eviction being shown to exist to the judgment, the appellant should be confined in his pleas and in his proof to the single question, and he will be let in to plead only upon terms that shall confine him to that issue alone.

Reversed with directions.

Le Grand Odell v. Robert Bell.

1. **EQUITY PRACTICE**--*Evidence and Relief Must Follow the Pleadings*.—A plaintiff can not file a bill upon one state of facts, and have relief upon another and different state of facts.

2. **DEEDS**--*Executed as Security—Equity may Grant Relief*.—A court of equity will relieve against a deed shown to have been given as security for a debt, upon payment of the debt.

Odell v. Bell.

BILL, for relief. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Reversed with directions. Opinion filed at the October term, 1896.

LOUIS KISTLER, attorney for appellant; GEORGE G. BELLOWS, of counsel.

ELA, GROVER & GRAVES, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed by the appellee to redeem—as from a mortgage—from a quit-claim deed, executed by the appellee to the appellant, September 4, 1877, as further security for the same debt, after a note and trust deed upon the same premises, given by the appellee to the appellant, January 20, 1877, for \$460, payable in four months thereafter, with interest at ten per cent per annum.

The decree gives relief upon the assumption that the deed was further security for the debt secured by the trust deed, but that the appellee was deceived by the appellant so that the appellee gave the trust deed for \$460, when it should have been but for \$100, and so holds that the appellee was responsible for only \$100 principal.

By so holding, the result is reached that the appellant has been more than paid—principal, interest and all taxes and assessments that he had paid, by the receipt of \$590 for insurance upon a house burned upon the premises.

He was not paid quite in full at the time he received the money for the insurance, if the debt was really \$460, and he has paid taxes and assessments since. Now the appellee can not file a bill upon one state of facts, and have relief upon another. *Morgan v. Smith*, 11 Ill. 194, has never been departed from.

We agree with the Superior Court, that the evidence proves that the deed of September 4, 1877, should be treated as a mortgage, but as a mortgage securing the \$460.

There is no sufficient evidence that any fraud was practiced when the appellee gave the trust deed. His letters in

the record show him to have been an intelligent, sprightly man, and how much or little he ever went to school—as recited in the decree—is nothing to the purpose.

The decree is reversed, with directions, that if the parties do not agree upon the items, which we expect they will do, the court cause an account to be taken by a master of the amount due to the appellee as upon a redemption from the trust deed, according to the terms of the note thereby secured, and enter a decree that upon payment, within ninety days thereafter, of the amount found to be due, with interest at the rate of five per cent per annum from the date when found, to the time of payment by the appellee to the appellant or his solicitors, the appellant convey the premises to the appellee, and pay the costs in that court. But if the appellee do not so pay, the bill be dismissed at the costs of the appellee. *Kirchoff v. Union Mutual Life Ins. Co.*, 33 Ill. App. 607; 133 Ill. 268.

Reversed, with directions.

Garden City Wire and Spring Co. v. John Kause et al.

1. REMEDIES—*When by Appeal.*—When a judgment by a justice of the peace is entered by default upon an irregular summons and the defendant has notice of such default and judgment in time, his remedy is by appeal. A bill to restrain the collection of the judgment will not lie.

2. JUDGMENTS—*Will Not be Set Aside for Irregularities Unless Unjust.*—Unless a judgment is unjust equity will not set it aside on account of irregularities as to the service of the summons.

3. WORDS AND PHRASES—“*If They do the Work.*”—A letter ordering smoke consumers contained the following, among other clauses: “If we find they do the work * * * we will take same and pay,” etc., and “if we do not take the same you are to remove,” etc. *It was held*, in a suit to collect the price of the consumers that if they in fact did “the work” the defendant was bound to so find and to take and pay for them.

Bill, to vacate a judgment. Appeal from Circuit Court, Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Opinion filed October 22, 1896.

Garden City Wire and Spring Co. v. Kause.

PARSONS & SMITH, attorneys for appellant.

J. W. BURDETTE, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Had the appellees demurred to the bill of the appellant, and had the court sustained the demurrer and dismissed the bill for want of equity, on the ground that the appellant should have pursued its remedy by appeal from the judgment complained of, we would have affirmed the decree. *Geraty v. Druiding*, 44 Ill. App. 440.

Kause obtained a judgment against the appellant before a justice on the 6th day of February, 1896, but the copy of the summons left with the appellant stated the return day to be the 16th instead of the 6th. On the 17th, the appellant had notice of the judgment, and had therefore yet nine days in which to appeal. It did not adopt that remedy, but on the 20th filed this bill against Kaue and the constable to enjoin the collection of the judgment. The appellees answered the bill, and though their answers contain the objection that the appellant has its remedy at law—stated in the present tense—that objection was not then true, as the time for an appeal had passed.

We will assume—without deciding—that the appellees have waived the defense that the appellant should have availed itself of its remedy by appeal.

But whatever the irregularity as to service of the summons, there is no relief in equity from the judgment unless it is unjust. See case already cited.

The cause of action upon which Kaue recovered, was under a contract as follows:

“CHICAGO, ILL., November 16, 1896.

Mr. John Kaue, City.

DEAR SIR: Confirming conversation had with you to-day, would state, you may put in two of your smoke consuming devices under our boilers and we will test the same in four weeks' time; if we find they do the work, and we have no trouble from the smoke inspector, we will take

same and pay you the sum of one hundred dollars for both devices; if we do not take same, you are to remove them without any expense to us and at a convenient time, when it will not necessitate our shutting down the plant. You to have them in during the present week, and, as stated above, it is to make no change in our present arrangement for firing our boilers.

Respectfully yours,

GARDEN CITY WIRE & SPRING Co.,
per GEO. BANCROFT, Treas."

The appellant argues that under that contract it had the right to reject the smoke consumers at its own election regardless of whether they did the work, and of the conduct of the smoke inspector; citing *Goodrich v. Van Nortwick*, 43 Ill. 445. But there the contract was, if the article "suited" the purchaser, he was to keep it; if not, return it.

Here, while the words are "if we find they do the work," etc., the meaning is, that if the smoke consumers in fact did the work; in that event the appellant was bound to find that they did. *Hawkins v. Graham*, 149 Mass. 284.

The words "if we do not take same," confer no option upon appellant, but are only introductory to what is to be done if the smoke consumers should not do the work, etc.

On this question the preponderance of the evidence was with the appellees, and the court properly dismissed the bill for want of equity.

The decree is affirmed.

International Cement Company v. Morris Beifeld.

1. BUILDING CONTRACTS—*Effect of Abandonment and Voluntary Assignment by Sub-contractor.*—Where a sub-contractor abandons his work and makes a voluntary assignment and thereafter neither he nor his assignee makes any attempt to execute the same, the original contractor may take charge of the work and complete it and may recover for damages sustained, without first procuring certificates from the architect as to the propriety of such a course or the amount of his dam-

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International Cement.Co. v. Beifeld.

ages under the contract, although such certificates are required by the contract.

Voluntary Assignment.—Error to the County Court of Cook County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed October 22, 1896.

That part of the contract over which the controversy in this case arose, which is considered by the court, is as follows:

12th. Should the party of the first part at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, such refusal, neglect or failure being certified by the architect, the party of the second part shall be at liberty, after three days' written notice to the party of the first part, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the party of the first part under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the party of the second part shall also be at liberty to terminate the employment of the party of the first part for the said work, and to enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the party of the first part, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the party of the second part in finishing the work, such excess shall be paid by the party of the second part to the party of the first part; but if such expense shall exceed such unpaid balance the party of the first part shall pay the difference to the party of the second part. The expense incurred by the party of the second part, as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties.

DAVID S. GEER, attorney for plaintiff in error.

MOSES, PAM & KENNEDY, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The writ in this case was sued out to reverse the action

of the County Court in allowing a claim against the insolvent estate of one Clyde D. Armstrong, who made a voluntary assignment September 10, 1894.

On July 30, 1894, defendant in error made a contract with Felix & Marston for the construction of a warehouse, he taking the entire contract. On the 6th of August of the same year, defendant in error sub-let the mason work to the insolvent, Clyde D. Armstrong. Among the provisions in the contract is the limitation of the time within which, as well as the manner, the work was to be done. Section 12 provides for an involuntary termination of the contract by defendant in error under certain conditions there stated.

The insolvent proceeded with the work under this contract, and had been working thereon for a short period, when complaints were received by defendant in error, from the owners, regarding the delay in the work. The complaints continued until the architect served notice, under Section 12 of the contract, on defendant in error.

On the 6th of September, after the defendant in error received a notice from the architect, attempt was made to serve a notice to proceed with the work, upon the insolvent, but the insolvent had left the work, and the notice was served September 7th upon his foreman, who gave it to the wife of the insolvent. The insolvent, Armstrong, left the job on the 5th, and was reported to be absent from Chicago. He was searched for by defendant in error, day after day, and not found until after the 10th of September, and after he had made an assignment.

Defendant in error then took charge of the work and completed it; filing in the County Court his claim for over \$5,000, the amount which he says he expended over and above the price he was to pay Armstrong. Plaintiff in error, a creditor of the insolvent, objected to the allowance of the claim; the County Court having heard the evidence adduced by the claimant and plaintiff in error, allowed the claim for \$3,272.94, that being the verdict of the jury to which the cause was submitted. Plaintiff in error, as such creditor and executor, prosecutes this writ of error.

International Cement Co. v. Beifeld.

It was made to fairly appear that the insolvent had, prior to the making of his assignment, so neglected to prosecute the work he had undertaken, if he had not abandoned it, that the defendant in error had reasonable ground for believing that it was necessary that he take possession of and complete the work; after the assignment, neither the insolvent nor his assignee exhibited any disposition to again assume to carry out the contract. The question as to whether defendant in error was justified in taking possession of and completing the work and charging the estate of Armstrong with what the completion of his contract cost in excess of the agreed price, and if so, what such excess amounted to, was submitted to the jury under instructions in which we find no sufficient warrant for reversing the judgment of the County Court.

We do not think, Armstrong having abandoned his contract and made a voluntary assignment in insolvency, that before the defendant in error can recover damages for the default he must procure the certificate of the architect as to the amount of such damage.

Armstrong made no attempt, after his assignment, to carry out his contract; he left it with little more than half of it done; neither he nor his assignee has applied to the architect to certify as to the amount of the damage suffered, or offered to abide by the award of the architect in this regard, should one be made. There is now invoked a provision of the contract, which, until the trial in the County Court, Armstrong and his assignee disregarded, and not even then expressed a willingness to abide by.

It was not necessary that defendant in error should apply to the County Court before taking possession of the work. The assignee evidently did not desire to carry it on at the expense of the estate; indeed, it would have been folly for him to have undertaken to do so.

We find no error requiring a reversal of the order of the County Court, and it is affirmed.

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Oakland Hotel Company v. Emma Driscoll.

1. APPELLATE COURT PRACTICE—*Errors Must be Assigned.*—Where there is no assignment of errors written upon or attached to the record, as required by the rules of this court, and none appearing anywhere except in the abstract, the judgment will be affirmed.

Assumpsit, for work, labor and services. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

GEORGE B. CHAMBERLIN, attorney for appellant.

WHITFIELD & DRISCOLL, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

There being no assignment of errors written upon or attached to the record filed in this cause, as required by the rule, and none appearing anywhere except in the abstract, there is nothing for this court to act upon. We refer to *Lang v. Max*, 50 Ill. App. 465, where many authorities are cited. Later decisions are, *Hruby v. Vokoun*, 55 Ill. App. 457, and *Brown v. The H. W. Boies Co.*, 58 Ill. App. 274.

We may add that the point is urged in appellee's brief, filed as long ago as November 2, 1896, and that no motion for leave to remedy the defect has been made, as might have been done.

Instead, however, of dismissing the appeal, as was done in many of the cases referred to, we will follow a later authority of the Supreme Court, and affirm the judgment. *Lancaster v. W. & S. Ry. Co.*, 132 Ill. 492.

Lake Shore & M. S. Ry. Co. v. Jan Dylinski, Adm.

1. LIMITATIONS—*Actions for Damages—Death from Wrongful Act.*—Actions for personal injuries, under section fourteen of chapter eighty-three, R. S., entitled "Limitations," do not include actions for damages under chapter seventy, R. S., for death caused by a wrongful act. Such

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actions are not for the injury suffered, but for the pecuniary loss to the widow and next of kin.

2. *SAME—Time Not Extended by a Non-suit.*—Actions for damages resulting from the death of a person caused by the wrongful act of another, may be commenced within two years after such death. The time is not extended by a non-suit in a previous action.

Action for Damages.—Death from negligence. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

WILLIAM McFADON, attorney for appellant.

J. WARREN PEASE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is the administrator of Joseph Dylinski, who was a laborer for the appellant, and was killed on the road on the morning of September 26, 1892.

He, with two companions, had, for something more than two months, worked for the appellant on the tracks westward several miles from South Chicago, where they resided. They went to, and returned from, their labor upon a handcar. It was a necessity of that mode of conveyance that they should be on the watch for, and get out of the way of, a train approaching from behind, as they ran the handcar upon that track of a double track upon which trains went in the same direction.

The circumstances under which the appellee charges the appellant with negligence, are that the deceased and his companions left South Chicago that morning as usual; that the morning was foggy and the wind adverse; that looking back toward South Chicago, they could see but a little way because of the fog, and of the smoke of South Chicago, and the adverse wind prevented the sound of bell or whistle reaching them, or at any rate they heard no such sound; that looking forward in the direction in which both train and handcar were going, objects were visible for a long distance.

The two companions did jump from the handcar and saved their lives. The deceased did not. This was the whole of the case of the appellee as to negligence, and it does not prove negligence. The fog, smoke and adverse wind were as obvious to the persons on the handcar as to the engineer and fireman on the locomotive, and probably much more so. The duty of the latter only required them to look forward, and they were sheltered from the wind. The crew of the handcar knew that train ought to come, and that they were to keep out of the way, and not stop it, as was proved by the appellee. He gave no evidence tending to show what was the conduct of the train hands, or how the train was managed, but relied upon the proposition that if a man upon the track was killed by a locomotive, the railroad must pay.

On the part of the appellant, there was much evidence showing affirmatively that the railway company was not negligent, but we omit any consideration of it, and confine ourselves to the case of appellee.

But there is a bar to this action by the lapse of time.

The death was instantaneous—head severed from the body.

Sec. 19, Ch. 83, Limitations, giving time to representatives to bring an action after the death of the person entitled to bring it, has no application, for the deceased never had any cause of action.

Section 14 of the same chapter, under the words "Actions for damages for an injury to the person," does not include actions under the statute, Ch. 70, for death "caused by wrongful act," etc. Such actions are not for the injury the person injured suffered, but for the pecuniary loss to widow and next of kin resulting from the death.

It follows that the provisions of Sec. 25 of Ch. 83, as to "actions specified in any of the sections of" that act, have no reference to actions given by Ch. 70.

The death was September 26, 1892. This suit was commenced October 29, 1894. Chapter 70 limited the time in which the action might be commenced to two years after

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the death. That time was not extended by a non-suit in a previous action.

The judgment must be reversed and the cause remanded.

On an amendment of the pleadings, the bar can be presented; or, on the evidence, the jury may be instructed peremptorily in favor of the appellant; and in either event, a question be presented of which the Supreme Court can take cognizance. Reversed and remanded.

Bertha Wolf and Della Wolf v. Henry Schlacks and Henry Ottenheimer:

1. **CONTRACTS—Recovery on Partial Performance—Abandonment.**—Where a party fails to perform his part of a special contract so as to prevent the other from fully performing, the latter may abandon the contract and recover in assumpsit for what he has done under it, whenever, except for the special contract, assumpsit may be maintained.

2. **SPECIAL CONTRACTS—Pleadings in Action Upon.**—Where a contract is open and unexecuted the plaintiff must specially set it out and aver a breach of the same, but where the contract is at an end either by its own original term or by the subsequent consent of the parties, or by the unjustifiable acts of the defendant, and nothing remains but to pay money, *indebitatus assumpsit* will lie although the debt accrued under a special contract.

3. **VERDICTS—Upon Conflicting Evidence, Conclusive.**—Where the jury hear conflicting evidence and see the witnesses, their verdict as to the truth of the matter under consideration may be regarded as conclusive.

Assumpsit.—Special contract. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

JAMES R. WARD, attorney for appellants.

STERN & LOUER and W. I. OSBORNE, attorneys for appellees.

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MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees sued the appellants for services rendered them, as architects, in the preparation of certain plans and specifications for a contemplated building by the appellants, and recovered judgment for five hundred dollars, from which this appeal is prosecuted.

The declaration consisted of the usual common counts in assumpsit, and the plea was the general issue.

A special oral contract between the parties was proved, by which the appellees agreed to prepare the plans and specifications, and superintend the work of constructing the building, for a compensation equal to four per cent of its cost, as testified by one of the appellees, or of three per cent of its cost, as testified by appellants' agent.

Plans and specifications, including the working drawings, were prepared under the direction of appellants' agent, and to his satisfaction, and were delivered to him for the purpose of exhibiting them to loan agents, who were to be, or had been, applied to for a loan to enable appellants to put up the building.

The proof shows that they were so used by appellants, and were never returned to the appellees.

The loan was not obtained, and appellants abandoned the undertaking, and this suit followed.

It is urged that there could be no recovery under the common counts, where the evidence showed a special and entire contract of an executory character, never performed.

When a party fails to perform his part of a special contract, whether sealed or unsealed, so as to prevent the other party from fully performing, the latter may abandon the contract and recover in assumpsit for what he has done under it, whenever, except for the special contract, assumpsit may be maintained. *Webster v. Enfield*, 5 Gill. 298; *Wilson v. Bauman*, 80 Ill. 493; *Schillo v. McEwen*, 90 Ill. 77; *Geary v. Bangs*, 37 Ill. App. 301.

In the last cited case, this court adopted the admirably precise statement of the law upon this subject, laid down in *Moulton v. Trask*, 9 Met. 577, as follows :

“ When a special contract is open and unexecuted, and the plaintiff proceeds for a breach of it, he must declare specially and set it out, and aver a breach. But when a contract is at an end, either by its own original terms, or by the subsequent consent of the parties, or by the unjustifiable acts of the defendant, and nothing remains but to pay money, *indebitatus assumpsit* will lie, although the debt accrued under a special contract, and such special contract may be proper and necessary evidence in support of the action.”

Whether, therefore, this recovery was sustainable under a declaration containing only the common counts, depends upon whether the appellees were prevented from completing the special contract by the wrongful acts or omissions of the appellants, of which, under the evidence, there can be no doubt.

It can not be, and probably is not, claimed by the appellants that they were ever ready to proceed any farther toward the erection of the building than to have the plans and specifications prepared, and bids received. At that point all further steps ceased, because the appellants could not raise the necessary funds. The defense, on the merits, does not go to the point that appellees did not proceed under the contract as far as they could, but that by the terms of the agreement they were to have nothing unless the loan was made and the building erected.

Upon that question the jury heard the conflicting testimony and saw the witnesses, and their verdict as to the truth of the matter must be regarded as conclusive.

Upon the question of what compensation was proper, or, in other words, the measure of damages under the *quantum meruit* count, there was evidence that tended to sustain the amount of the verdict, which was for \$370 in excess of the judgment that was entered after a remittitur of that amount was made.

Upon a consideration of all the evidence, with no substitution of our personal views, we can not entertain much doubt but that the services rendered were reasonably worth as much as the judgment was for.

There was no error in permitting witnesses to testify as to what, under the circumstances, was the value of the services, and we do not feel at liberty to reverse the judgment, simply because we might think a less sum would have been nearer to a reasonable limit.

The building, originally contemplated, was to cost \$25,000. The one for which the plans and specifications were prepared, in accordance with the wishes of appellants' agent, would have cost from \$30,000 to \$35,000.

Taking into account a mortgage of \$9,000 that already existed upon the land, the appellants were unable to borrow as much money as was needed, and they abandoned their proposed undertaking.

Unless the appellees agreed to charge nothing for their services unless the required loan was secured, and the jury found upon conflicting testimony that they did not so agree, it was right that they should be paid a reasonable sum for their services in making the plans and specifications, which appellants took and appropriated to themselves.

Though we may think the recovery is somewhat too large, we discover no material error in the record, and therefore we must affirm the judgment.

Frederick Becklenberg v. Louis F. Hopkins.

1. VERDICTS—*Upon Questions of Fact.*—Verdicts upon questions of fact are, in general, conclusive.

Replevin.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

This case was begun before a justice of the peace, as an action of replevin. The constable being unable to find the property, a judgment in trover for the plaintiff for \$100 was rendered by the justice.

Holmes v. Hamburger.

Upon appeal to the County Court, a trial was had before a jury, who returned a verdict of \$81 damages, upon which appellee had judgment.

W. J. LAVERY, attorney for appellant.

ADOLPH L. BENNER, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Only a question of fact is involved in this case. Appellant claims to have purchased a piano which he had once received for storage.

Appellee claims to have an order from the alleged vendors to deliver the piano to him, appellee.

Whether the chattel mortgage held by appellee is valid, or was a lien superior to the claim of appellant, is now immaterial. The jury found, in effect, that appellant had been tendered all his proper charges for storage, and that thereupon appellee became entitled to the possession of the property in dispute.

Appellant's claim that he had bought and paid for the piano, was discredited by the jury.

The judgment of the County Court is therefore affirmed.

W. H. F. Holmes v. Isaac L. Hamburger.

67	121
67	536
67	121
104	255

1. ALIMONY—*Must be for the Benefit of the Wife.*—All orders for alimony or suit money against a husband as party to a divorce suit must, so far as the record shows, be in favor of, or for the benefit of, the wife herself. Parties supplying her with food, clothes and lodging during the pendency of the suit can not come to the court for compensation.

Divorce and alimony.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

HERVEY H. ANDERSON, attorney for appellant.

It has been held that a divorce suit will not be dismissed until the solicitor has been paid, although the parties have returned to cohabitation. *Dixon v. Dixon*, 2 P. & M. 253; *Cooper v. Cooper*, 3 Swab. & Trist. 392; *Twisleson v. Twisleson*, 2 S. R. 339.

SAMUEL W. JACKSON, solicitor for appellee, contended that an attorney or solicitor has no lien for his fees. *Forsyth v. Beveridge*, 52 Ill. 268; *LaFramboise v. Grow*, 56 Ill. 197; *Nichols v. Pool*, 89 Ill. 491; *Story v. Hull*, 143 Ill. 506.

“An attorney has no lien on the subject-matter of the suit which he is employed to prosecute that can in anywise impair the right of his client to transfer the same to a third person *pendente lite*.” *LaFramboise v. Grow*, 56 Ill. 197.

Parties to a suit may settle the same at any time, and courts will enforce settlements so made. *Chapman v. Shattuck*, 3 Gilman, 49; *Toupin v. Gargnier*, 12 Ill. 79; *Henchey v. Chicago*, 41 Ill. 136; *Christopher v. Ballinger*, 47 Ill. 107.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant was the solicitor for the wife of the appellee, in a bill filed by her for a divorce. The appellant prepared a petition for alimony and solicitor's fees, but before anything could be done upon it the husband and wife came together again and refused to pay the appellant for his services.

The suit being still pending, he filed a petition on his own behalf, that the appellee might be compelled to pay him.

With or without the statute of 1874, all orders for alimony or suit money against a husband, party to a divorce suit, are to be in favor of, or for the benefit of—so far as the record shows—the wife herself. Parties supplying her with food, clothes and lodging *pendente lite*, can not come to the court for compensation.

That his client may prove fickle is one of the risks taken by a lawyer filing a bill for a divorce on behalf of a married woman who has no property. The divorce suit was dismissed by a part of the same order denying him relief.

He had no standing in court, and the order appealed from is affirmed. *McCullough v. Murphy*, 45 Ill. 256.

**Peter Schoenhofen Brewing Company and Loren Love
v. John Merrion.**

1. **HOUSEHOLD GOODS—*The Term Defined.***—The term “household goods,” as used in the act of July 7, 1889, “to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic’s tools,” means such goods as, being suitable to the condition and station in life of the mortgagor and the way he lives, are used by him in his household for personal, home or household convenience.

2. **SAME—*What Are Not Household Goods.***—Goods which are kept for mere purposes of trade or business, are not within the meaning of the act.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered in the Circuit Court of Cook County, on the 15th day of February, 1896.

On the 28th day of August, 1893, J. V. Merrion, a son of the appellee herein, being indebted to the Peter Schoenhofen Brewing Company, executed a chattel mortgage conveying to the said company certain goods and chattels used by him in a saloon and boarding house located at No. 9001 Ontario avenue, in the city of Chicago. The mortgage was recorded in the recorder’s office on the 31st day of August, 1893. The goods and chattels described in the said chattel mortgage were: One bar and back bar, two writing desks, one mirror, one two-faucet beer pump and all connections complete, one glass partition, one hotel counter, one cigar case and stand, one clock, two tables, six chairs, all glassware and bar utensils, sixteen beds, bedding and mattresses, twenty-four chairs, sixteen dressers, one parlor suit of five pieces, one range, all carpets, six dining room tables, three dozen common chairs.

At the time of the execution of the chattel mortgage, the

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mortgagor was a married man living with his wife in the rooms above the saloon; this portion of the premises was used as a boarding house. The wife did not join in the execution of the mortgage.

On the 14th day of August, 1894, Thomas V. Merrion, a brother of the mortgagor, as the agent of John Merrion, the appellee herein, removed a portion of the goods and chattels used by the mortgagor in the boarding house, to a warehouse. On the following day the mortgagor gave to his father, the appellee herein, a bill of sale for the goods and chattels stored in the warehouse.

On the same day Loren Love, one of the appellants, as the agent of the Brewing Company, foreclosed the chattel mortgage and took possession of the saloon fixtures at 9001 Ontario avenue, and also of the goods which had been stored in the warehouse, which consisted of one writing desk, one writing table, one clock, eight pictures, one set of window curtains, one hundred and twenty feet of awning, one set of gas fixtures, six cuspidors, one range, three heating stoves, six dining room tables, forty-eight dining room chairs, one side-board, one lot of dishes, one lot of silverware, one lot of kitchen utensils, two dining room stoves, six pieces of parlor furniture, two folding beds, sixteen beds, sixteen dressers, sixteen toilet sets, bowl, cuspidors; one lot of carpets and matting, one lot of fixtures, one lot of bedding, one lot of linen, sixteen bed-springs, sixteen mattresses, one lot lamps, three rocking chairs, one lot curtains, one lot of common curtains, two kitchen tables, two parlor stoves, one gasoline stove, and bric-a-brac.

On August 23, 1894, the property taken by Love was sold at public sale to Henry Schauermeyer, who took immediate possession.

On the day of the sale, August 23, 1894, but some hours afterward, the appellee, John Merrion, commenced this suit against the Brewing Company, and their agent, Love, to recover possession of the goods mentioned in the bill of sale, and sold by Love under the chattel mortgage. Schau-

ermeyer, the purchaser at the mortgage sale, was not made a party to the suit. No goods were taken by the sheriff under the replevin writ.

The plaintiff's declaration contained the usual counts in replevin and a count in trover. The issues were made up and the case was tried before a court without a jury. Judgment was rendered against the defendants for \$200, from which judgment this appeal is taken.

Counsel for appellant says: "There is no dispute as to the facts. The only question is the validity of the chattel mortgage under which the sale was had."

M. M. JACOBS, attorney for appellants, contended that the goods and chattels described in the chattel mortgage are not household goods within the meaning of the statute. 2 Starr & Curtis' R. S. (2d Ed.), p. 2773; Gaines v. Williams, 147 Ill. 458; Commonwealth v. Strembach, 3 Rawle (Pa.), 341.

Chattel mortgages on household goods, executed by a married man, the wife not joining therein, are voidable only, not void. Van Shaak v. Robbins, 36 Iowa, 205; Somes v. Brewer, 2 Pick. 191; Green v. Kemp, 13 Mass. 518; Terrill v. Auchauer, 14 O. St. 85; Crocker v. Balangre, 6 Wis. 645; Anderson v. Roberts, 18 Johns. 529.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The term "household goods" has been frequently construed with reference to its meaning when used by testators, and also with reference to its significance when employed in statutes. It is said that in wills this expression will pass all articles of the household which are not consumed in their enjoyment, that were used or purchased, or otherwise acquired by the testator for his house, but not goods in the way of his trade. 1 Jarman on Wills, Perkins' Ed., 589.

Substantially the same definition is given in Anderson's

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Dictionary of Law, and is said to be the true meaning when such expression is used by a railroad in its statement that household goods will be transported at a certain rate of fare. *Smith v. Findley*, 34 Kas. 316.

The term "household goods" is more extensive than the expression "household furniture." *Canagy v. Woodcock*, 2 Mumford (Va.), 234.

The expression "household goods" was held in *Pratt v. Jackson*, 3d Brown's Parliamentary Cases, 199, not to include bedding not in the house of the testator, but used by him in a hospital for the enjoyment of sick and wounded seamen.

Section 2 of an act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools, in force July 7, 1889, is as follows:

"No chattel mortgage executed by a married man or married woman on household goods shall be valid unless joined in by the husband or wife, as the case may be."

It has been held by the Supreme Court, in *Gaines v. Williams*, 146 Ill. 458, that section 1 of this act, forbidding the foreclosure of a chattel mortgage on the necessary household goods, etc., of any person or family, except in a court of record, is to be liberally construed in favor of the mortgagor, and it would seem that section 2 of the act is to be construed in the same manner. We think the term "household goods," as used in this act, means such goods, as, being suitable to the condition and station in life of the mortgagor and the way he lives, are used by him in his household for personal, home or household convenience, and that goods kept for mere purposes of trade or business, are not within the meaning of the act.

The only difficulty existing in this case arises out of the fact that the goods used for the trade and business of the mortgagor were not, at the time the mortgage was made, separated in any way from the household goods proper, for, and made use of by him and his family for home and house-keeping.

Upon the trial it appeared that when appellee, the mort-

gagor, closed his saloon and moved the articles, for the recovery of which this replevin suit is brought, to a warehouse, giving a bill of sale of the same to the plaintiff, he left everything in the saloon, including the partitions, glasses and some liquors, to pay his indebtedness under the mortgage, he estimating such articles to be worth about \$500; and that these things, together with those sold to the plaintiff and stored in the warehouse, were taken by appellants under their mortgage.

The mortgagor testified that the property for which the writ of replevin was taken out, was worth \$349.60, all of which, he testified, appellants took possession of by force, and none of which were recovered upon the replevin writ; that all the household goods were necessary in his house and family; that the four beds were worth \$6 each, and the four springs were worth \$1 each; that the pictures cost him \$16; that his family consisted of himself, his wife and one child.

It is manifest, by a comparison of the list of goods described in appellant's mortgage, with those which it seized and carried away, that it took many articles to which it can not be pretended it had any right, as eight pictures, one set of window curtains, 120 feet of awning, set of gas fixtures, one range, three heating stoves, one lot of silverware, one lot of kitchen utensils, two dining room stoves, sixteen toilet sets, two parlor stoves, one gasoline stove, bric-a-brac, and other articles.

The mortgagor, at the time of making of the mortgage, prepared a list of the articles mentioned therein, having attached thereto the value placed by him thereon; this list was introduced in evidence by appellant, and was intended to be, but is not, inserted in the bill of exceptions.

Under all the evidence, we think the court was warranted in making a finding of \$200 for the plaintiff.

The judgment of the Circuit Court is therefore affirmed.

George A. Kittredge v. Louis M. Slack, for use, etc.

1. **ASSIGNMENTS—*For Use of Assignor, Void.***—If the purpose of an assignment, concurred in by both the assignor and the assignee, is to place the property assigned either wholly or in part under the after control of the assignor, the assignment is void against creditors of the assignor.

2. **SAME—*Effect of, on Litigation.***—An assignment of a fund which does not change the legal title, will not prevent a suit by the assignor, but the court on the equities between the assignor and the assignee, may permit the latter to control the action.

3. **GARNISHMENT—*Claims by Assignee of a Fund, How Litigated.***—It is not an obstacle to a garnishment, that an assignment which has not changed the legal title, has been made of the fund, but the assignee may set up his title by interpleader when the validity of such assignment as vesting a prior equity in the assignee will be tried.

Garnishment, and interpleader. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

L. S. HODGES, attorney for appellant.

JAMES D. SPRINGER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. Slack was indebted to the appellant and to Burt.

Slack was earning commissions from the Hewitt Manufacturing Company. From Pittsburgh, Pa., Slack sent to the company an assignment as follows:

“PGH., PA., October 1st, 1894.

Hewitt Manufacturing Co., Chicago, Illinois.

DEAR SIR: I have assigned and conveyed to George A. Kittredge, of Chicago, all interest in commissions, etc., due me from your company during balance of this year (1894). Kindly transfer account to his name on your books and pay all commissions now due, or hereafter to become due, to him. He will probably call on you to-morrow with his authority from me for this transfer.

Yours truly,

L. M. SLACK.”

Kittredge v. Slack.

At the same time Slack wrote to the appellant as follows :

“ Frank E. Rutan, Architect, 111 Fourth avenue, Pittsburgh, Pa.

PGH., Oct. 1st, 1894.

DEAR———: I have written to The Hewitt Mfg. Co., conveying and assigning my account with them to you, and that you would call on them to-morrow for a check for commissions for September. This check ought to be pretty large, perhaps enough to take up entire notes, as the Illinois Central have bought 500 cars, for which we got the brasses, besides brass for eighteen engines in addition to regular business. By doing this they will give you check in your own name which will save time. If you get this through to-morrow, write me or wire Wednesday so I need not worry about it. It is possible that I will have a check from Hewitt to-morrow. If I do I will wire you and mail draft. I think I would see Chas. M. Hewitt at 925 Monadnock Building, about this first, then if he is not home see Jim Watson at the works, 21 Ontario street.

If you get enough out of this, charge my account with the 200 cigars Jack has had and send 200 more right away to the same address. Just have notice of notes.

Yours, etc., Lou.”

Thereafter the appellant wrote to the company as follows :

“ CHICAGO, ILL., Nov. 14, 1894.

Mr. Jas. Watson, care Hewitt Mfg. Co., City.

DEAR SIR: As a personal favor, if your firm is unable to pay Mr. Slack his commissions due him two weeks ago, will you please drop me a line so that I may know when I may expect it. Last month you told in your office you would mail it to me by the sixth of each month, so I presumed you would and promised people he owes to pay them on the seventh. There is nothing in this for me but friendship, as you know, and so please let me hear from you in that line and oblige.

Yours sincerely,

GEORGE A. KITTREDGE.”

The company paid to the appellant, October 11, 1894, \$127.19, and November 28, 1894, \$252.55.

Watson, the secretary and treasurer of the company, testified that after the assignment—but whether before or after any payment thereunder, does not appear—the appellant told him, Watson, that he, appellant, “was simply transacting the matter for Mr. Slack, and there was nothing in it for him. He was simply doing it as a matter of friendship for Mr. Slack.” * * * “Handling such commissions as he got from us in the payment of Mr. Slack’s bills.”

The assignment was sent to the company without any “previous talk” about giving an assignment, and the letter of October 1, 1894, sent by Slack to the appellant, was the “first intimation” that the appellant had of it.

The case below was a garnishment of the company by Burt, as creditor of Slack, and interpleader by the appellant, claiming under the assignment.

The amount found due from the company to Slack was \$409.22, for which judgment was entered for the use of Burt. The evidence is satisfactory that Slack was at the time of the assignment, and continued to be, indebted to the appellant in a much larger amount, yet if the purpose of the assignment, concurred in by both the appellant and Slack, was, wholly or in part, to place the proceeds under the after control of Slack, it is void against creditors of Slack. *Mitchell v. Sawyer*, 115 Ill. 650.

Now that the letter of October 1, 1894, from Slack to the appellant, the letter of November 14, 1894, from the appellant to Watson, and the testimony of Watson—if unexplained—do warrant the conclusion of such purpose, seems apparent; and the explanation by the appellant as a witness—with no other—only makes a case of such conflict as the finding of the trial judge, sitting without a jury, is final upon.

It is urged that the assignment put the fund out of the control of Slack, and that therefore it was not subject to garnishment by his creditor; citing *Chatroop v. Borgard*, 40 Ill. App. 279. The distinction between that case and this,

Barth v. Union National Bank.

is in the fact that there the debtor never had any cause of action against the garnishee; here the debtor had, after the assignment, a cause of action against the garnishee; but if it had been sued upon, the court—upon equities between the debtor and the assignee—would have permitted the latter to control the action—which could only be in the name of the debtor. It has never been considered an obstacle to a garnishment that an assignment—which can not change the legal title—has been made of the fund. But upon an interpleader the validity of such assignment, as vesting a prior equity in the assignee, is in question. *Buxbaum v. Dunham*, 51 Ill. App. 240; *Gregg v. Savage*, 51 Ill. App. 281; same case with names reversed, 150 Ill. 161.

The judgment is affirmed.

L. L. Barth v. Union National Bank.

1. **INJUNCTIONS**—*What Are Not Impediments to Granting.*—The fact that a certificate is in *custodia legis* and the custodian is the party interested in evading the claims of third persons upon such certificate, is no impediment to such restraint upon such custodian, as may be prudent to prevent wrong-doing.

2. **ASSIGNMENT OF ERRORS**—*Must be Special.*—Where a part of an order enjoining the prosecution of a replevin suit is valid and the assignments of error upon it are in effect that the whole order is invalid if the order is in part right, the assignments must be overruled.

3. **TROVER**—*Lies for Property Not Taken in Replevin.*—Where property has not been taken in replevin, the plaintiff may proceed in trover for it, or if taken and the replevin suit is not prosecuted successfully, and the property not returned, the plaintiff may maintain trover for it.

4. **MEASURE OF DAMAGES**—*Conversion of Certificates of Stock.*—In actions of trover for the conversion of certificates of stock as between the owner and the wrongdoer, the measure of damages is the value of the stock represented by the certificate.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed October 22, 1896.

MORAN, KRAUS & MAYER, attorneys for appellant; GRAHAM S. HARRIS, of counsel.

TENNEY, McCONNELL & COFFEEN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order granting, without notice, an injunction to the appellee to restrain the appellant "from selling, transferring or otherwise disposing of the fifty (50) shares of the capital stock of the Edward Hines Lumber Company represented by certificate number twenty-eight (28)." The bill, properly verified, alleged that the stock was pledged to the bank as collateral security for a note of the appellant for \$5,000, which being overdue, the bank notified the appellant that it would sell the stock at auction; that at the time and place of sale the appellant appeared, with two attorneys, one of whom objected to the sale proceeding, and the other asked to see the certificate, which being handed to him he immediately delivered it to a constable, who held a replevin writ sued out by the appellant from a justice, upon an affidavit stating that the value of the certificate was \$10. The bill alleges that the stock is worth \$5,000.

We disregard the statement in the bill, of the fear of the bank that the appellant "will make way with the said certificate," and also the clause in the accompanying affidavit that "the rights of the complainant in said bill will be unduly prejudiced if the injunction prayed for therein is not issued immediately and without notice;" but the suing out a replevin writ, upon an affidavit that the stock was of the value of \$10, followed by the presence of the appellant at the time and place of sale, attended by two attorneys, whose combined fees must have been that sum several times multiplied, is of itself such evidence that the appellant was reckless of consideration worthy of regard, that, taking into account the method adopted to obtain possession of the certificate, it did fairly "appear" to the court that the conclusion expressed in the affidavit accompanying the bill was

a just one. So much of the order as has been recited is therefore affirmed.

The fact that the certificate is in "*custodia legis*," when the custodian is the party interested in evading the claim of the bank upon the certificate, is no impediment to such restraint upon him as may be prudent to prevent wrongdoing.

To the residue of the order enjoining the prosecution of the replevin suit, there is no separate assignment of error. The assignments are in effect that the whole order is wrong, and therefore if it is in part right, the assignments must be overruled. 2 Ency. Pl. & Pr., 951.

The order appealed from is affirmed.

MR. JUSTICE GARY, ON PETITION FOR REHEARING.

This petition seems to be prompted by a feeling that the opinion filed "reflects unwarrantably upon the appellant."

Then it is said that "the contention of the appellant now is, and his position when making the affidavit, was, that the mere certificate was of purely nominal value."

If the certificate had not been taken on the writ, the appellant might have proceeded in trover, or being taken, if the replevin suit had been prosecuted unsuccessfully, and the certificate not returned, the appellee might have maintained trover. Sec. 18, Ch. 119, Replevin; Bruner v. Dyball, 42 Ill. 34.

In either of such events the measure of damages would have been the value of the stock represented by the certificate. Olds v. Chicago Open Board of Trade, 33 Ill. App. 445.

In contemplation of law, that is the value of the certificate as against a wrongdoer. The replevin suit was upon the assumption that the appellee was a wrongdoer, and the action of trover for non-return would have been on the assumption that the appellant was a wrongdoer. So in either case the subject-matter of controversy was, in contemplation of law, worth the value of the stock represented by it, and the justice had no jurisdiction. Now, that for a debtor

to take from the possession of his creditor, collateral, pledged for the debt by legal process sued out from a court having no jurisdiction, upon an affidavit to be justified only by a casuistry that would whittle away the value of notes of solvent banks, is a proceeding commending itself to a court of equity, can hardly be contended.

The appellant now, in the petition, for the first time attacks the bond filed when the injunction was issued. That attack is too late. *West Chicago Park Commissioners v. Kincade*, 64 Ill. App. 113.

There is little resemblance between this case and *Mexican Asphalt Co. v. Mexican Asphalt Paving Co.*, 61 Ill. App. 354.

The injunction there was to prevent the execution of legal process sued out by an adversary having no relations with the complainant, and to prevent the removal of the asphalt from the State. The process issued from a court having jurisdiction, and the plaintiff in it was not, therefore, to be restrained in the exercise of his legal right; and as he had never had possession of the asphalt, that part of the injunction which prohibited it from taking the asphalt out of the State had no foundation; the whole injunction was wrong. It is not the want of jurisdiction of the justice which gives the appellee here a standing in equity, but a misuse of means to get possession of the certificate; and the fact that such misuse was under color of legal proceedings, is no palliation and does not shut the door of equity.

The petition for a rehearing is denied.

Henry Lindeman v. John Wagner et al.

1. BUILDING CONTRACTS—*Architect's Certificate—When Final.*—When the parties to a building contract stipulate that the decision of the architect shall be final and binding upon all parties, such decision will be final and binding upon the parties unless it is shown that the architect acted fraudulently, and the burden of showing such fraud is upon the party complaining.

Lindeman v. Wagner.

2. **CONTRACTS—Signed by Unauthorized Parties—Ratification.**—When a party to a contract not signed by him acts under it with full knowledge of the manner in which it was made, he will be bound by it.

Assumpsit, for work, labor and services. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered in the Superior Court of Cook County, against the appellant in favor of appellees on May 16, 1896, for the sum of \$474.60.

On the 10th day of July, 1893, a contract was made, and its terms reduced to writing, and signed by the parties thereto, whereby appellees agreed to do certain mason work, and appellant promised as follows:

“Party of the second part, in consideration of parties of the first part strictly performing covenants and agreements above specified, by or at the times mentioned, and to the entire satisfaction of Frank L. Fry, superintendent, does agree to pay to parties of first part \$11,500 on certificates of superintendent as work progresses.”

The contract also contains the following:

“It is further agreed that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be performed under it, or in relation to the plans, drawings and specifications hereunto attached, the decision of Frank L. Fry, the architect, shall be final and binding on all parties hereunder, or, if preferred, the decision of an umpire selected by two men, one of whom is appointed by the owner and the other one by the contractor, shall be final and binding on all parties hereunder. The owner has engaged Frank L. Fry as superintendent of the erection and completion of said building, his duties being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings, etc. * * * Also to make estimates for the contracts of the amounts due them on the contract, in no case estimating any materials

or work which are objectionable or have become permanent parts of the work, and when the building is completed to issue a certificate to the contractor, which certificate, if unconditional, shall be an acceptance of the contract, and shall release him from all further responsibility on account of the work, the owner being bound in all cases to recognize the acts of his superintendent."

Appellees offered in evidence in support of their claim the contract above mentioned, and also the architect's certificate, dated December 16, 1893, certifying that \$474 is due John Wagner & Son, by the terms of contract.

Henry Lindeman, appellant, on the witness stand denied giving any authority to Charles S. Fry to sign any contracts for him, and that said Charles S. Fry had informed him that said mason work would not cost over \$9,000. The testimony shows that the buildings were not completed until some weeks after the time specified in the contract.

It was claimed by appellant that the work was not done in a good and workmanlike manner, in accordance with the contract, and the claim was supported by the testimony of two architects.

Appellant, in a plea of set-off, set up a counter-claim of \$3,300 for delay, and damage in not completing the building in a workmanlike manner.

F. J. TOURTELLOTTE, attorney for appellant; W. P. BLACK of counsel.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is true, as contended by appellant, that the architect had no power to change the contract, or to do more than was intrusted to him by the agreement, and that if he acted fraudulently, the parties are not bound by such action. It does not appear that the architect acted fraudulently; he may

Dore v. Northwestern Elevated R. R. Co.

have erred in thinking that the work was well done—the testimony given on behalf of appellant tends to show that he did—but there is no evidence to the effect that the architect was actuated by any improper motive. The burden of showing that the architect fraudulently gave the certificate in question, was upon appellant; this he did not show. The mere fact that the building was not completed at the agreed time, and that the architect allowed appellees the full contract price, did not establish that the certificate was fraudulently issued.

It is too late for appellant to contend that he did not authorize Fry, the architect, to sign the agreement.

Appellant accepted such signing, acted under the contract with full knowledge of how it was made, and is bound thereby.

The judgment of the Superior Court is affirmed.

**Ann B. Dore v. Northwestern Elevated R. R. Co. et al.
Union Consolidated Elevated Ry. Co. et al. v. Andrew
Bolter, George S. Bullock et al.**

1. FORMER DECISIONS—*Govern these Cases.*

Appeals, from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Opinion filed October 22, 1896.

HAMLIN, SCOTT & LORD, attorneys for appellants.

KNIGHT & BROWN and JOHN P. WILSON, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The questions involved in each of these cases have been repeatedly passed upon by this court, and in ac-

cordance with the rulings in *Tibbetts v. The West & South Towns Ry. Co.*, 54 Ill. App. 180; *North Chicago St. Ry. Co. v. Cheatham*, 58 Ill. App. 318; *Stewart v. Chicago General Street Ry. Co.*, 58 Ill. App. 446; *General Electric Ry. Co. v. The Chicago City Ry. Co.*, Vol. 28 Chicago Legal News, 406; *Phelps v. The Lake St. Elevated Ry. Co.*, 60 Ill. App. 471; affirmed by the Supreme Court.

The decree of the Superior Court dismissing the bill of *Ann B. Dore v. The Northwestern Elevated Railroad Company et al.*, for want of equity, is affirmed, and the order of the Superior Court granting an injunction in *Union Consolidated Elevated Railway Company v. Andrew Bolter, George S. Bullock et al.*, is reversed.

William Harlev et al., for use Philip D. Armour et al., v. William Harlev, Jr.

1. **LOST RECORDS—*How Restored.***—If any portion of the record of a cause is lost the court may restore it on the application of a party interested, but parties opposed in interest should have reasonable notice and an opportunity to ascertain whether the loss is to be truly supplied.

2. **PRACTICE—*Error, how Shown.***—Before this court can reverse a decision of a lower court, it must affirmatively appear that the court below erred.

3. **SAME—*Contents of Lost Pleading—How Proven.***—It is not error to refuse permission to file an alleged copy of a pleading which has been lost; and an affidavit of the correctness of the copy is not sufficient, but affiant should be sworn as a witness and subject to cross-examination when his statements regarding the contents of the lost paper will be competent evidence.

4. **GARNISHMENT—*Relative Rights of Garnishing Creditor and Interpleader.***—Between a garnishing creditor and an interpleader, any transaction not tainted by fraud in fact, which gives to the interpleader, as against the original debtor, the fund in question, is good against the garnishment.

5. **PAYMENT—*Burden of Proof.***—Payments upon a debt are affirmative facts to be proved by the party claiming the benefit of such payments.

6. **NEW TRIALS—*Diligence as to Newly Discovered Evidence.***—Before a new trial will be granted on account of newly discovered evidence

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the proof must negative every circumstance from which negligence can be inferred. An affidavit stating that diligent search for the desired evidence was made, is not sufficient, as it gives the court no information as to the efforts made, but only the opinion of the affiant of his diligence.

Garnishment Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 5, 1896. Rehearing denied November 19, 1896.

ALFRED R. URION and ABRAM B. STRATTON, attorneys for appellants.

ENNIS & COBURN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Armour & Co. sued out, upon a judgment in their favor, against William Harlev (senior) and Alfred Harlev, garnishee process against the Griffith & McDermott Construction Co., who answered, stating a purchase of property from Alfred Harlev, acting for himself and William Harlev (senior), as a firm named William Harlev & Son, and that the appellee claimed the price of the property.

The result was that the appellee came in under the provisions of sections 11 and 12 of chapter 62, Garnishment, as an adverse claimant of the fund. He stated a purchase of a building which was part of the property, from the firm, and a chattel mortgage from them, and, as a witness, testified that the firm owed him \$1,722.91, and for the building he allowed \$175 as payment, and took a chattel mortgage on other property to secure the residue.

Among the mortgaged property were some wheel-barrows, also sold to the garnishees.

Whether the appellee's claim was based upon a truthful statement of the facts, was a question for the jury. The verdict can not be disturbed on the evidence alone.

On the trial the appellants asked leave to file what they presented as a sworn copy, by affidavit attached, of an original answer—as they called it—filed by the appellee,

and lost from the files, for the purpose of using it as evidence.

If any portion of the record of a cause is lost, the court may restore it on the application of a party interested; but a party opposed in interest should have reasonable notice, and an opportunity to ascertain whether the loss is to be supplied truly. *Harris v. Lester*, 80 Ill. 307.

It was not error in the court to deny the offer to file, as part of the record, matter presented as this was. Had the appellants proved by a witness, subject to cross-examination, the fact of loss and the correctness of the copy, they might have used the copy as evidence, if its contents were material on the issue to be tried.

The points argued by the appellants are, as to that supposed copy—refusals by the court to peremptorily instruct the jury on the facts—and the refusal to grant a new trial on account of newly discovered evidence. We have already said sufficient about the facts.

Even if the supposed newly discovered evidence were material, and not cumulative, it does not appear that there was any diligence in looking for it before the trial.

The judgment is affirmed.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

The first point made is, that the decision is wrong upon the question of filing the alleged copy of the alleged first answer.

Why the court would not permit it does not appear, nor does it appear that the counsel for the appellee objected to the filing; but before we can reverse, it must affirmatively be shown that the court erred.

Now, an affidavit attached to a paper is not proof of a fact which may be contested, viz., whether the supposed copy was a true copy. As the affidavit was made by the attorney who presented the alleged copy, why was he not sworn as a witness, subject to cross-examination, to the truth of the copy? Then, if he established its truth, whether it should be filed or not, was of no consequence

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for the purpose for which he wished to use it. With or without filing, it would have been competent evidence for the appellants as a prior statement by their adversary, relating to the subject-matter of the controversy.

The dispute between these parties is over proceeds of property sold to the Griffith & McDermott Construction Company. Between a garnishing creditor and an interpleader, any transaction not tainted by fraud, in fact, which gives to the interpleader, as against the original debtor, the fund in question, is good against the garnishment. *Gregg v. Savage*, 51 Ill. App. 281; affirmed, with names reversed, in 150 Ill. 161.

So also, against an assignee for the benefit of creditors. *Schwartz v. Messinger*, 64 Ill. App. 495.

To what extent possession had been taken by the interpleader of the purchased property, or what dealings with the mortgaged property he had permitted to the mortgagors, would be material only upon the question of whether there was an intent by the parties to commit a fraud upon creditors.

The appellee having shown an original actual indebtedness to himself—if he told the truth—his statement that he thought but “could not say” that he had been paid for the wheel-barrows, when the case showed that the purchaser had not paid for them, is not conclusive evidence; though he does say that such payment came from one of the original debtors, who are pretty clearly insolvent.

The only exceptions during the trial are to the action of the court upon that supposed copy, and refusal to peremptorily instruct for the appellants upon the facts—in neither of which matters did the court err.

If less than the total fund in controversy remained due to the appellee, the appellants might have been entitled to the difference, but no such aspect of the case was presented to the court below. Payments upon the debt were affirmative facts to be proved by the party claiming the benefit of such payments.

The burden of proving the negative was not upon the appellee.

As to diligence upon the newly discovered evidence, the affidavit of the appellants' attorney is, "that prior to the time of going to trial he inquired diligently among persons doing business with William Harlev & Sons, and others, with the view to ascertain whether any of the balance of the mortgaged property had been sold, but was unable to secure any information that would throw any light upon the subject."

Such an affidavit gives the court no information as to the efforts made, but only the opinion of the affiant of his diligence.

The affidavit should have gone into a minute detail of the efforts, for it was necessary that it should "negate every circumstance from which negligence may be inferred." *Crozier v. Cooper*, 14 Ill. 139; *Champion v. Ulmer*, 70 Ill. 322.

The petition for a rehearing is denied.

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Hartford Deposit Co. v. John Pederson.

1. **QUESTIONS OF FACT—*For the Jury.***—Whether an elevator was furnished with the best safety devices known and in use at the time of an accident, and whether a defect in those appliances or devices was a latent one, and such as had not been and could not be, discovered upon due inspection, nor by the application of the usual and recognized tests of science in that behalf, are questions of fact for the jury.

2. **INSTRUCTIONS—*Must be in Writing.***—Oral instructions are not permitted under our statute, and the court is not bound to heed an oral request that the jury be instructed in any particular.

3. **PRACTICE—*Reasons for New Trial.***—Errors which are relied upon as grounds for reversal should be brought to the attention of the trial court in the written reasons filed in support of a motion for a new trial.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

BURNHAM & BALDWIN, attorneys for appellant.

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J. WARREN PEASE, attorney for appellee; W. S. ELLIOTT, JR., of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment of three thousand dollars for personal injuries occasioned to him by the falling of an elevator, in which he was descending as a passenger, from the eighth floor of the fourteen-story building owned and operated by the appellant, situated at the southwest corner of Dearborn and Madison streets, Chicago.

The defense below, and the grounds urged here for a reversal, may briefly be stated to be that the elevator was furnished with the best safety devices known and in use at the time, and that the defect in those appliances, or devices, was a latent one, and such as had not been and could not be, discovered upon due inspection, nor by the application of the usual and recognized tests of science in that behalf.

Such matters are all questions of fact, which, upon very full evidence adduced on the trial before a jury, both for and against, and after presumably full consideration by the trial judge, who heard and saw the witnesses, have been determined adversely to the appellant.

But a single instruction was asked or given in behalf of the plaintiff, and it is not argued that such was erroneous in any respect, and all instructions asked by the defendant were given. There is, therefore, no question of law presented to us, except in the one particular, that it was "error for counsel (of the plaintiff) to persist in offering evidence after it had been declared inadmissible by the court."

The offers complained of, made three times during cross-examination of defendant's witnesses, were made to show that the defendant, immediately after the accident, replaced the pipes in use (one of which burst and caused the fall), with others much stronger.

Upon objection to such offer, the objection was always sustained, and of course such ruling could not be excepted to by the one in whose favor it was made. But it is said:

“The error which we claim is the refusal of the trial court to instruct the jury to disregard this offer, in the nature of an argument to the jury, of evidence so manifestly calculated to lead the jury to a wrong conclusion.”

The record is devoid of any such instruction being offered by the defendant. If it were requested at all, it was done orally, and oral instructions are not permitted under our statute. We will not assume that if such an instruction in writing had been offered, it would not have been given, and the court was not bound to heed an oral request that the jury be instructed in any particular. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581.

Furthermore, the written reason in support of the motion for a new trial made no reference to the persistent attempt that is complained of, as should have been done if appellant desired to raise the question in this court, independently of asking a specific written instruction that would cover the point.

For aught contained in the record, the judgment must be affirmed.

**Mary E. Blair, Lucia D. Ford, Margaret J. Harwood,
Charles J. Burton and Edward A. Burton v.
George A. Follansbee, Adm.**

1. **EXPRESS TRUST—When Created.**—The following language—“Received from Stephen Burton, twelve thousand five hundred dollars, on which sum I agree to pay him interest * * * so long as he shall live, interest payable semi-annually. And within eighteen months after the death of said Stephen Burton, I agree to pay said principal sum in manner following: \$2,500 to Lucia D. Ford, or her heirs * * * with interest on said several sums of money,” * * * does not create an express trust allowable against an estate as a preferred claim of the sixth class.

Administration of Estates.—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

Blair v. Follansbee.

W. D. WASHBURN, attorney for appellants.

FRANK ASBURY JOHNSON, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

During the lifetime of Stephen Burton, the appellee's intestate executed and delivered to him a paper in writing as follows :

“\$12,500.

Received from Stephen Burton, twelve thousand five hundred dollars, on which sum I agree to pay him interest at the rate of six per cent per annum, so long as he shall live, interest payable semi-annually.

“And within eighteen months after the death of said Stephen Burton, I agree to pay said principal sum in manner following: \$2,500 to Lucia D. Ford, or her heirs; \$2,500 to Mary E. Blair, or her heirs; \$2,500 to Margaret J. Harwood, or her heirs; \$2,500 to Charles J. Burton, or his heirs; \$2,500 to Edward A. Burton, or his heirs, together with interest on said several sums of money last mentioned at six per cent per annum from the date of the payment of the last installment of interest to Stephen Burton, until paid. Interest and principal payable at my office in Chicago, Illinois.

EDWIN BEAN.

Chicago, April 6, 1881.”

The said Stephen Burton died September 22, 1889, and the appellants are the persons mentioned in the writing as ultimate payees of the money. The said Edwin Bean died October 7, 1890, and appellee is administrator of his estate. Within apt time the appellants filed their claim, predicated upon said writing, in the Probate Court of this county, against Bean's estate, and petitioned that the same be allowed as a preferred claim under class 6, Sec. 70, Chap. 3, Rev. Stat., entitled “Administration of Estates,” upon the ground that the writing constitutes an express trust within the meaning of said class 6.

The Probate Court refused to allow the claim as of class 6, but ordered and allowed it as of class 7, which placed it

upon a level with all claims having no quality or dignity entitling them to a preference.

Upon appeal to the Circuit Court by the claimants, a like order was made, and now this court is appealed to.

On the trial, it was shown that on the same day of giving the above instrument, Bean executed to Burton a mortgage on real estate, wherein it was recited that Bean was "justly indebted" to Burton in the sum of \$12,500, evidenced by his certain instrument in writing of that date, and that on April 3, 1882, Burton released the mortgage, but expressly recited in the release that it was "not in satisfaction of said debt."

There was no recital in the mortgage, any more than there is in the writing in question, declaratory of any trust.

We can not put into a document a meaning that itself does not warrant. Looking at the paper, it appears to be no more nor less than an acknowledgment of an indebtedness for money loaned to Bean, upon which he agreed to pay interest to one person until the happening of a certain event, and eighteen months from the happening of that event, to pay the principal sum and interest, unpaid and to accrue, to other persons.

To hold such an agreement to constitute a trust in the promisor for the benefit of the persons named of the ultimate payees of the fund, would be to hold, in effect, that every promissory note which should not mature during the lifetime of the payee, who remained the holder at his death, would evidence a trust fund in the hands of the maker for the benefit of the heirs or personal representatives of the payee. In the latter case, the law would with equal certainty point out the persons entitled to the money, as in this case the parties did by their own act. We refer to *Weer v. Gand*, 88 Ill. 490; *Svanoe v. Jurgens*, 144 Ill. 507; *Steele v. Clark, Adm.*, 77 Ill. 471.

We do not deem it to be necessary to add anything because of the fact that both Burton and Bean styled the transaction as a debt and not as a trust, in the mortgage and release deed.

The judgment of the Circuit Court is affirmed.

C. Edward Peterson v. W. H. C. Stege.

1. **SURETYSHIP—How Proven.**—Where a father and son signed a note together, and the proceeds were paid to the son, and when the note became due the son objected to the making of a new note because his step-mother did not want his father to sign any more notes for him, *it was held* that parol proof that one joint maker of a note is surety for the other is competent; that the father was a surety, and that the payee had notice.

2. **SURETY—How Released.**—A valid agreement for the extension of the time of payment of a note releases a surety thereon unless he assents to the extension, if the payee had notice that he signed as surety.

Assumpsit, on notes. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed November 19, 1896.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellant.

PINCKNEY & TATGE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action by the appellee upon two promissory notes, each for the sum of \$1,500, signed by the appellant and his son William F. Peterson, payable to, and discounted by, the Chicago City Bank.

The appellee stands in the shoes of the bank—has no greater right than the bank could enforce.

One note is dated December 22, 1893, payable in ninety days, and the other January 30, 1895, payable in six months.

The defense is, that the bank had notice that the appellant was but surety for his son on each note, and that without his knowledge, the bank extended to the son, the time of payment on each note.

From the testimony of the president and the cashier of the bank, it appears that the first note was brought to the bank by the son, already signed, and was discounted by the

bank in the ordinary course of business. When it became due, the son wanted an extension, and the president told him to get his father to sign a new note, and the son said that his step-mother objected to his father signing any more notes for him. The son then said, "Is there some other way for me to fix it to get the extension?"

So the bank took a new note from the son, dated March 24, 1894, payable ninety days after date, reciting the deposit of the original note as collateral.

There were several renewals of both notes in substance in the same manner, and the son paid the interest in advance upon each renewal.

The proceeds of the discounts were put to the credit of the son in his account with the bank; it is admitted that he got the money.

The consideration of the notes going only to the son was, at least, a circumstance tending to show notice to the bank that the appellant was, as between his son and himself, only a surety. *Cummings v. Little*, 45 Me. 183.

When, added to that, the bank was told as a reason for not asking the appellant to sign a new note, that the step-mother objected to the appellant signing any more notes for the son, the notice to the bank was clear that the appellant was only a surety.

Parol proof that one joint maker was surety for the other, is competent. *Ward v. Stout*, 32 Ill. 399.

That fact being incontestible, and notice to the bank proved, the taking of the new notes, and receiving in advance the interest for the time they had to run, was an extension of the credit to the son which discharged the appellant, unless he assented to the extension, of which there is no proof. *Danforth v. Semple*, 73 Ill. 170.

The judgment against the appellant is reversed and the cause remanded.

Tobin v. Friedman Mfg. Co.

Michael Tobin v. Friedman Manufacturing Company.

1. **PRACTICE—***When a Case Should be Taken from the Jury.*—It is proper for the court to take the case from the jury, whenever the evidence produced, with all inferences that can be justifiably drawn from it, is insufficient to support a verdict, should one be found.

2. **NEGLIGENCE—***Failure to Foresee Natural Results.*—In a suit against a master based on his alleged negligence, the servant is chargeable with notice of all natural results, with which every mature and reasonable person is supposed to be acquainted.

3. **MASTER AND SERVANT—***Care Required of Master.*—A master is not required to interpose and forbid the use of an apparatus which his servants have adopted for their own convenience, when it is clear that nothing but careless misuse of it can result in injury.

4. **SAME—***Liability of the Master.*—The mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be expected to take of himself; and if defects in machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master urges or coerces the servant into danger or in some other way directly contributes to the injury.

Trespass on the Case, for personal injuries. Error to the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

ROSENTHAL, KURZ & HIRSCHL, attorneys for plaintiff in error.

PECKHAM & BROWN, attorneys for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The trial court, at the conclusion of plaintiff's case, instructed the jury to return a verdict for the defendant, and judgment was entered upon such verdict.

The only question before us, therefore, is, was there sufficient evidence, with all inferences that the jury could justifiably draw from it, to support a verdict if one had been

returned for the plaintiff. *Simmons v. Chicago and Tomah R. R. Co.*, 110 Ill. 340; *Frazer v. Howe*, 106 Ill. 573.

The personal injury for which plaintiff sought a recovery was sustained while he was a servant for the defendant in the capacity of loading ice into a refrigerator car.

The declaration consisted of three counts. The first count charged the employer with failing to use ordinary care in supplying appliances of reasonable strength and firmness for the purpose of lifting the ice into the cars.

The second count charged failure to give proper supervision over said work, in order that the same might be conducted in a manner reasonably safe in its execution.

The third count charged that plaintiff was inexperienced and ignorant of the dangers, and defendant was negligent in not giving plaintiff reasonable information, warning and instruction.

The evidence showed that the plaintiff had been in the service of defendant, as a laborer, for five or six days, and that up to the day before the accident, he had worked at rolling and lifting tierces of lard and "hustling around as they wanted."

On the day before he was hurt he was ordered by the foreman to assist men who were engaged in "icing" some refrigerator cars, and he worked in that capacity during that day, and on the following day, until ten o'clock in the morning, when the injury happened.

The cars were loaded by storing the ice into the ice boxes of the cars through holes in their roofs, constructed something like the scuttle or hatchway to a flat roofed house, and the customary way of getting the ice up to the car roofs had been, prior to two or three days before the plaintiff was put at that work, by men throwing the ice, with tongs, from a lower platform, to other men who stood upon the car roofs. Cakes of ice weighing not above fifty pounds each were thus put into the cars, and axes and other tools were furnished for cutting the ice, which usually was in cakes weighing about 150 pounds, into cakes that could be thus handled.

Tobin v. Friedman Mfg. Co.

About two or three days before appellant was put at the work of "icing," the men engaged at that job took an apparatus called a beam scale, which was in construction something like a very large "saw horse," and was used for hanging scales to, while tierces were being weighed, and placed it on top of two cars that stood side by side, in such a way that two of its legs rested upon the roof of one car, and its other two legs upon the roof of the other car. Then, by the aid of a rope thrown over the beam, they hoisted ice from the ground to the tops of the cars. This process of lifting up the ice was in use by the men when appellant went to work with them, and was pursued successfully all of that day, as it had been for two previous days. On the morning of the second day of his work there, and while he, together with two other men, was pulling at the rope hoisting a cake of ice, the beam or horse tipped over, and in some way the appellant was struck and injured in its fall.

It was shown that at the end of each day's work the horse was taken down and was set up again on the next morning, and, of course, it needed to be moved whenever the job of filling the cars on which it stood was completed.

The beam or top of the horse was about five feet long, and although we fail to discover that its height was given by any witness, it is fairly inferable from its other dimensions and the use for which it was designed, that it must not have been far from five feet high. Its legs slanted in both directions, so that from the foot of one leg to the foot of the other leg on the same end of the beam, was about two feet, and from the foot of the legs on one end to the foot of the other legs on the other end of the beam, was about seven feet, and the whole, used as a scale beam for weighing purposes, was calculated to sustain a weight of 1,000 pounds.

It was shown that the foreman knew of the use the horse was being put to, and made no objection. It was also shown that when the opening through the roof of one car was of the right distance from that of the alongside car, the legs of the horse would, to some extent, be held in place by the

frame or curbing that surrounded the holes and extended two or three inches above the level of the roof, but that such a coincidence of distance would not always happen is apparent. No other method of holding the horse in place was adopted by the men, and the only thing that influenced the horse to stand upright, aside from its method of construction, was that of its own weight and the weight of whatever was suspended from it. It is no more than to apply the law of natural forces, to say that whatever operated to draw laterally upon the top of the horse would tend to overturn it, and that whatever operated to draw perpendicularly upon it would tend to keep it upright.

Appellant urges that because the foreman knew of the use to which the workmen were putting the horse, it was an adoption by the appellee of that method of loading, and the appliance being insufficient and insecure, and appellant not being warned of its insufficiency and danger, the appellee was liable.

There does not appear to have been anything insecure in the horse itself. It was built to sustain a much greater weight than that of the ice hoisted at any one time, and it is plain that it was an entirely safe apparatus so far as holding the loads put upon it was concerned. It was only unsafe when improperly used. Although the foreman knew of the use being made of it, there is no evidence that he ever saw it used except in a proper way—by the men who pulled the rope standing near enough to a perpendicular line drawn from the horse to the ground so as not to draw laterally upon it with much force, and thus tend to overturn it. The apparatus had been used in perfect safety for at least three days, and such fact tends strongly to show that on the occasion of the injury the men who pulled the rope must have drawn upon it in a manner which every man of reasonable judgment knows would tend to overturn it.

The appellant was one of the men so engaged, and was clearly a fellow-servant with the others engaged with him in pulling the rope, and with the men on top of the car who received the ice from the hoisting apparatus. Unless, there-

Tobin v. Friedman Mfg. Co.

fore, the accident occurred for some cause for which none of those so engaged were responsible, there could be no recovery.

Concerning the use of the apparatus, appellant's reply brief says: "When in the first instance it was brought out, it was so done by the men; yet in the evenings it was put into the building, and in the morning brought out again in the sight and presence of the foreman," * * * who "allowed this apparatus to be put upon the tops of the cars, and there used without any fastening." It must, in the very nature of the use to which it was put, have been moved not alone at morning and evening, but also whenever a car was loaded and another put in place for loading. The appellant, therefore, must have seen and known, as well as any other member of the "icing" gang, how the apparatus was put and sustained in place. It was not necessary that he should have belonged to the force that worked on the top of the cars to have understood that much. He could know, and must have known, as well as they, that it was not unfastened from anything when it was taken down, nor fastened to anything when it was put up, and it would be quite too great a stretch of any rule to require that the foreman should have interposed and forbidden the use of an apparatus which the men had adopted for their own convenience, when it was clear that nothing but careless misuse of it could possibly result in injury. Appellant must be chargeable with notice of all natural results with which all mature and reasonable persons are supposed to be acquainted.

Appellant had, in the few days of his work for appellee, before he was put at work loading ice, seen the men engaged at that work throw the ice up in the manner in vogue before the horse was used, and he had assisted in the work of hoisting by means of the horse during one day before he was injured, and, as we have already seen, he must have known that the horse was not fastened, or held in place, in any way except by the weight of itself and its load.

It is not claimed that appellant ever said anything to the foreman, or to anybody else to whom he might complain,

that there was anything dangerous in the horse itself or in the manner of its use, and it is evident that the only danger that could ensue was in the manner of using it, for which appellant and his fellow-servants were alone responsible. In that respect he voluntarily assumed the risk and was rightfully denied a recovery.

“The mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be expected to take of himself. And so it is held that where the defects in the machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on the servant or coercing him into danger, or in some other way, directly contributes to the injury.” *Pennsylvania Co. v. Lynch*, 90 Ill. 333.

Had the cause been submitted to the jury and a verdict found for the appellant, it would have been the duty of the trial court to have set the verdict aside, and for that reason it was a case falling within the rule laid down in the cases cited, *supra*, to that point.

The judgment of the Superior Court is therefore affirmed.

Charles F. Hirsch v. Anna Hirsch.

1. EQUITY PRACTICE—*When a Decree will not be Disturbed on Appeal.*—The decision of a chancellor who heard and saw the witnesses will not be disturbed on appeal where the evidence is voluminous, conflicting and irreconcilable.

Bill, for separate maintenance. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

H. P. TOMLIN and H. VON HORN, attorneys for appellant.

L. S. & M. S. Ry. Co. v. Conway.

R. R. LANDIS and LOUIS BOISOT, Jr., attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
These parties are husband and wife.

She filed a bill for separate maintenance, and he a cross-bill for a divorce. The court sustained the first, granting a separate maintenance and solicitor's fees, upon the amount of which no question is made in appellant's brief, and dismissed the cross-bill.

We are now asked to reverse the decision of the chancellor who saw and heard the witnesses, whose conflicting and irreconcilable testimony fills nearly two hundred pages of this record. This can not be done without violating established rules, and the decree is affirmed. *Jenkins v. Cohen*, 138 Ill. 634; *Barrows v. Barrows*, Ibid. 649; *Duberstein v. Duberstein*, 66 Ill. App. 579.

Lake Shore & M. S. Ry. Co. v. William R. Conway.

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118	4487

1. PLEADING—*What Need Not be Proven.*—In a suit against a railroad company, for negligence, where the declaration charged that the “defendant permitted its track to be and remain out of repair, and dangerous for the running of cars thereon,” and that “said train was improperly and insufficiently manned and lighted,” it was held, that, whether proof of the latter charge was made or not, was, after verdict, immaterial.

2. NEGLIGENCE—*Master's Failure to Keep Property in Safe Condition.*—In a suit by a servant against his master, based on personal injuries resulting from an accident caused by a defective condition of the property of the defendant, where the defective appliances were not used by the plaintiff, it is not necessary to prove that the defendant had notice of their defective condition; it is sufficient for the plaintiff to show that the defendant, by the exercise of reasonable diligence, might have known of the defective condition complained of.

3. PLEADING—*What a Sufficient Allegation of Ordinary Care.*—An allegation that a plaintiff “was in the usual and ordinary course of his employment,” amounts to a statement that he was in the exercise of ordinary care.

4. SAME—*Failure to Plead Ordinary Care Cured by Verdict.*—A failure to allege that a plaintiff was in the exercise of ordinary care, is cured by a verdict in his favor.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

STATEMENT OF THE CASE.

This is an action on the case to recover for injuries received by William R. Conway, on November 22, 1892, at Twenty-first street, Chicago.

At that street crossing the defendant maintained gates which were operated from a tower house, situated near the northwest corner of the intersection of the tracks of the defendant with said street, and just west of the westernmost of said tracks.

The plaintiff was in the employ of the defendant, and he operated said gates from said tower house. He was in said tower house when he received his injury.

He worked from 5:30 P. M. to 7 A. M. each day.

The defendant had two side-tracks and two main tracks at Twenty-first street at the time of the accident. The westernmost of these tracks stood next to and at the foot of the tower house. This was only a side track, and a short one at that.

On this side track, at a quarter past one in the morning, or thereabouts, an engine with one car attached came from the south. The engine was headed south, the car was in the rear of the engine, and the engine backed this car north over Twenty-first street.

In going over Twenty-first street the north pair of wheels of the car left the side-track, while the south pair of wheels on the same car remained on the track, as did also the engine. The derailment occurred after the car had passed over the line of the south sidewalk of Twenty-first street, and was half way over the distance of the width of the street.

The car derailed was moving three or four miles an hour. It was a box car. It moved only nine to ten feet after the derailment, yet it struck the tower in which plaintiff was. It toppled it over, and he received his injuries in this way.

The negligence charged was "that the defendant so carelessly, negligently and improperly managed said railroad, that by and through the carelessness, negligence and improper conduct of the said defendant, the track of said railroad on which said train was then and there running at and near to said crossing, was suffered and permitted to be and remain out of repair and dangerous for the running of trains thereon; and so carelessly, negligently and improperly managed, operated and conducted said train that by and through such carelessness, negligence and improper conduct, said train was insufficiently and improperly manned and lighted, and by and through and by reason of the carelessness, negligence and improper conduct aforesaid, one of the cars of said train jumped the track and ran with great force and violence to and upon and against the support of the said tower house in which the said plaintiff was, as aforesaid, engaged in the pursuit of his employment, as aforesaid, and by running against the same, caused said house to fall a great distance"—threw over a stove, and plaintiff was injured, etc.

The trial resulted in a verdict of \$9,000 for plaintiff. Defendant moved for a new trial, which was overruled. Defendant then moved in arrest of judgment, which motion was overruled, and judgment was rendered on the verdict under exception of defendant.

WM. McFADON, attorney for appellant.

SULLIVAN & McARDLE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We think that the jury was warranted in finding that the injury to appellant was caused by the negligence charged

in the declaration, viz., in permitting the track, off which the car ran, to be and remain out of repair and dangerous for the running of trains thereon. The statement in the declaration, "said train was insufficiently and improperly manned and lighted," was but a mere recital; whether proof of the same was made, is, after verdict, immaterial. *B. & O. S. W. Ry. Co. v. Then*, 159 Ill. 535.

The plaintiff was not bound to prove that the defendant had notice of the defective condition of the track. Neither the track nor the car was an appliance or instrumentality with which the plaintiff discharged his duties. He was injured, not because of a defect in anything supplied to him by his employer, but because appellant drove a car against the tower in which he was working.

Doubtless the obligations of a railroad in respect to side tracks are not as onerous as in regard to the main line; and had appellee been working upon the car which ran off, and thus been injured, a question very different from the one at bar would be presented. The declaration does not, in terms, allege that the plaintiff was, when injured, in the exercise of ordinary care, but it sets forth that he was in the usual and ordinary course of his employment in the tower house; this amounts to a charge that he was in the exercise of ordinary care. *Gerke v. Fancher*, 158 Ill. 375.

Moreover, a failure to allege that a plaintiff was in the exercise of ordinary care is cured by a verdict against the defendant. *A., T. & S. F. Ry. Co. v. Feehan*, 149 Ill. 202; *Ill. Cent. Ry. Co. v. Simmons*, 38 Ill. 242; *B. & O. Ry. Co. v. Then*, 159 Ill. 535.

It was not necessary that the plaintiff should show more than that the defendant, by the exercise of reasonable diligence, might have known of the defective condition of the track which caused the accident. As to this, a defective condition caused by an accumulation of frozen snow and mud, is very different from a defect arising from a flaw in a rail, a thing which might not be discoverable save upon a minute and, before the passage of each train, impracticable examination. *Wood on Master and Servant*, Sec. 329, 389, 411.

Brady v. Washington Ins. Co.

While not entirely approving of the instructions, we do not think that the defendant was unduly prejudiced thereby.

The damages recovered seem large, but are not so great as to shock our sense of right.

The judgment of the Circuit Court is therefore affirmed.

O. M. Brady v. Washington Insurance Co.

1. JUDGMENTS—*Setting Aside—Notice.*—Notice must be given to the parties in interest before a final judgment can be set aside after the close of the term at which it was rendered.

2. JURISDICTION—*Must Appear in Record to Sustain Judgment.*—On direct proceedings to review a judgment, the jurisdiction of the court over the persons must appear by the record, or the judgment can not be sustained.

Transcript, from justice of the peace. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed November 19, 1896.

F. L. SALISBURY, attorney for appellant.

A. L. FLANINGHAM, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

April 30, 1896, an appeal, by the appellee here from a justice, pending in the Superior Court, was dismissed for want of prosecution at the costs of the appellee here and appellant there, for which final judgment was then and there entered.

May 23, 1896, which was in the following term of the court, without notice, so far as the record shows, to the appellant here, that judgment was set aside and the appeal reinstated.

At the next term thereafter, the case was called for trial and dismissed for want of prosecution, and final judgment entered against the appellant here for costs.

Whether there was such cause for setting aside the first judgment as would have been available upon the common law writ of error *coram nobis*, does not appear by this record—and probably there was no such cause; but if there had been, the court had no jurisdiction, having once lost it by the lapse of the term, to act without notice. *Morgan v. Campbell*, 54 Ill. App. 242; *Underwood v. Masterson*, No. 6678, filed November 5, 1896.

On direct proceedings to review a judgment, the jurisdiction of the court over the person must appear by the record, or the judgment can not be sustained. *Ibid.*, and *Law v. Grommes*, 158 Ill. 492, reversing 56 Ill. App. 312.

Although the record states that the appellant excepted to the last action of the court, it does not appear that he did anything that waived his right to object that the court had not regained jurisdiction of the case, as did the defendant in *Prall v. Hunt*, 41 Ill. App. 140, and the plaintiff in *Nat. Un. Bldg. Ass'n v. Brewer*, *Ibid.* 223. See also *Newlan v. Lombard University*, 62 Ill. 195, and *Humphreyville v. Culver*, 73 Ill. 485, that litigants may waive a preceding disposition of their case.

The judgment of the June term, 1896, is reversed, and the cause remanded with directions to vacate the order of the May term, 1896, unless some cause be shown for setting aside the judgment of April, 1896, which would be sufficient on a writ of error *coram nobis*.

As to what would be such cause, there is much learning in the books.

Reversed and remanded with directions.

Franklin MacVeagh et al. v. Chase & Sanborn.

1. VOLUNTARY ASSIGNMENTS—*Time Allowed to Take Possession of Property*.—An assignee appointed under our statute concerning general voluntary assignments by insolvents for the benefit of creditors, has a reasonable time in which to gain possession of the assigned property, and is not required to run a race with other claimants, in order that by first obtaining possession his title may be made perfect.

2. DEEDS—*Presumption as to Delivery and Acceptance—When They*

MacVeagh v. Chase & Sanborn.

May Be Rebutted.—It will be presumed that a grantee will accept a deed which is beneficial to him, and where a deed has been properly acknowledged and recorded, a delivery will be presumed; but these presumptions will yield to the facts which may be established.

3. DEEDS—*Acceptance—Effect of, on Liens.*—An acceptance of a deed is essential to pass title to property intended to be conveyed thereby, and if a lien attaches to property conveyed by deed after the deed is signed and recorded, but before it has been accepted, such lien will not be divested by a subsequent acceptance.

Assignment for Benefit of Creditors.—Appeal from the County Court of Cook County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed October term, 1896.

STATEMENT OF THE CASE.

The appeal in this case is from an order entered by the County Court of Cook County, in the proceedings under the assignment of William Musk, denying to the appellants their claim to a lien on certain assets of the estate, under an attachment sued out from the Circuit Court of Cook County, and levied upon the property before the assignee obtained possession. The facts, as shown by the evidence, and as recited by the Circuit Court in its final order, are substantially these:

William Musk had been doing business as a grocer and marketman, on Sixty-third street, in the city of Chicago, and as such had become indebted to MacVeagh & Co., in the sum of \$3,937.20. On the morning of July 2, 1895, as Musk had absconded, MacVeagh & Company sued out an attachment in the Circuit Court of Cook County and placed the writ in the hands of the sheriff, who immediately proceeded to Musk's store and levied upon his stock. It appears that a few moments prior to attachment, there had been filed in the office of the county clerk, a deed of assignment from Musk to the Chicago Title & Trust Co., as assignee, and shortly after the deputy sheriff levied on the property, Mr. Boyd, claiming to represent the assignee, appeared on the scene and demanded possession of the property, which was refused.

The deed of assignment, although it was evidently prepared and intended to be signed by the assignee as evidence of an acceptance of the trust created by the deed, was not so signed, nor had the assignee at the time the sheriff levied, filed a formal acceptance of the assignment, or made itself a party to the instrument, in any manner.

The right of the assignee to the property being thus disputed, and the property being actually in the possession of the sheriff, who claimed to hold it for the benefit of the attaching creditor, the assignee, being unable to obtain possession, resorted to negotiation. MacVeagh & Co. declined to allow the sheriff to turn the property over to the assignee, unless their lien was recognized to the same extent that it would be if the property remained in the sheriff's hands; that is to say, that if they succeeded in sustaining their attachment on a trial in the Circuit Court, they should be first paid out of the proceeds of the sale of the property. This the assignee assented to; reported the facts to the County Court, and obtained from that court an order authorizing an agreement to that effect, with MacVeagh & Co. and the sheriff; thereupon the following written contract was entered into between the assignee and MacVeagh & Co.:

"COUNTY COURT OF COOK COUNTY.

In the matter of the voluntary assignment
of
William Musk.

It is hereby stipulated and agreed by and between the Chicago Title & Trust Company, assignee of the above named insolvent, and Franklin MacVeagh & Co., that a deed of assignment was, on the day of the date hereof, made and delivered to the above named assignee, and that on going to the place of business of said William Musk, at Nos. 555-557 Sixty-third street, said assignee found the sheriff in possession of the stores and contents of said insolvent, at said numbers, under and by virtue of a writ of attachment issued from the Circuit Court of Cook County, wherein Franklin MacVeagh & Co. are plaintiffs and said William

MacVeagh v. Chase & Sanborn.

Musk is defendant, said writ bearing date July 2, 1895; and whereas, it is to the interest of all parties concerned, for the preservation of said estate, that said business be, at least temporarily, conducted by the assignee, it is therefore hereby stipulated and agreed that the sheriff of Cook county may turn over to said assignee all of the property now in his possession and so levied upon, under and by virtue of said attachment writ, it being understood and agreed that the lien of said writ on said property shall attach to the net proceeds thereof, in the hands of the assignee, and if said attachment, on the trial thereof in said Circuit Court, shall be sustained, the judgment rendered in favor of the plaintiffs in said suit, shall be paid out of such proceeds, to the extent of the proceeds of the property thus attached. And the parties hereby consent that an order may be entered by the County Court, to carry out this stipulation.

Chicago, July 2, 1895.

CHICAGO TITLE & TRUST COMPANY, Assignee,
By HENRY W. LEMAN, 2d Vice-President.
FRANKLIN MACVEAGH & COMPANY,
By TENNEY, McCONNELL & COFFEEN, Attys."

The property was not turned over on July 2d, owing to a delay caused by other attaching creditors, and on July 5th another order was entered, reciting the making of this contract between the Chicago Title & Trust Co., assignee, and MacVeagh & Co., approving it, and making a somewhat similar provision as to the liens of other attaching creditors. The property was then turned over to the assignee, and, under the consent which MacVeagh & Co. had given in their contract, the assignee continued to run the business formerly carried on by the insolvent, and finally sold the property, and now holds the proceeds, amounting to \$2,700.

Some time after this, a petition was filed by Chase & Sanborn, creditors of the insolvent, in which they allege that the title of the assignee was superior to any claim of MacVeagh & Co., under their attachment; that the court, therefore, ought not to have authorized the assignee to enter into such a contract; that MacVeagh & Co. ought not

to have entered into that contract; and therefore the court ought to set aside both the contract and the orders authorizing and confirming it, and disregard the priority of the attachment, and distribute the fund *pro rata*.

An order in accordance with this petition was entered, from which order appellants prosecute this appeal.

TENNEY, McCONNELL & COFFEEN, attorneys for appellants.

SMITH, HELMER, MOULTON & PRICE, attorneys for appellees.

JESSE HOLDOM, attorney for Chicago Title and Trust Company, assignee, appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The assignee appointed under our statute concerning general voluntary assignments by insolvents for the benefit of creditors, has a reasonable time within which to gain possession of the assigned property, and is not required to run a race with other claimants, in order that by first obtaining possession his title may be made perfect. *Lowe v. Matson*, 140 Ill. 108; *Mann v. Reed*, 49 Ill. App. 406.

The important question in this case is, therefore, when did the assignment take effect?

Deeds take effect so as to pass title only from delivery and acceptance. To an indenture there are always at least two parties.

Where a deed is probably beneficial to the grantee, it may reasonably be presumed that he will accept the same; and where a deed has been properly acknowledged and recorded, a delivery will be presumed, but this presumption, like all presumptions which exist only for convenience, will yield to the facts which may be established. *Washburn on Real Property*, Vol. 3, 309, Fifth Ed.

It is said that a deed when accepted relates back to the time of its execution and recording. This, as between the

Klein v. Boyd.

grantor and grantee, may be so, but how as to the rights of third parties?

As an acceptance of a deed is as essential to the passing of title as is a delivery, it is difficult to see how a lien created prior to the acceptance, that is, prior to the passing of the title, can be divested by such acceptance. As to which, see Washburn on Real Property, Vol. 3, p. 310; Moore v. Flynn, 135 Ill. 74; Hulich v. Scovill, 4 Gilm. 159; Kingsbury v. Burnside, 58 Ill. 310; Union Mutual Ins. Co. v. Campbell, 96 Id. 267.

We do not regard the statement by the vice-president of the Title and Trust Company, that his company would act as assignee, as constituting an acceptance of a deed not then in existence. It is clear that the Trust Company was not bound by such promise, and might the next day have refused to accept the deed.

Before the assignee had in any manner accepted the assignment, or made itself a party thereto, appellants' attachment became a lien upon the property. Subject to such lien, the title was, by the assignment and the acceptance thereof by the Trust Company, transferred to the assignee.

The judgment of the County Court is reversed and the cause remanded, with directions to allow appellants a prior lien if they shall maintain their writ of attachment.

Leon Klein v. Charles L. Boyd, Receiver, etc.

67	165
1896	325

1. **REHEARING—***Effect of Petition for.*—A petition for rehearing does not change the time at which a final judgment, previously entered, takes effect.

Debt, on an appeal bond. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed October term, 1896.

FELSENTHAL & D'ANCONA and PECK, MILLER & STARR, attorneys for appellant.

MOSES, PAM & KENNEDY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon a former occasion this cause was here. The opinion then and now entertained by this court is reported in 62 Ill. App. 585.

After the remanding of the cause, appellant asked leave to amend his plea, which leave the court properly refused to give.

A petition for rehearing does not change the time at which a final judgment, previously entered, takes effect. West Chicago Park Commrs. v. Kincade, 64 Ill. App. 113.

The judgment of the Superior Court is affirmed.

Commercial National Bank of Chicago v. Lincoln Fuel Company.

1. PRACTICE—*Verified Denial of Indorsement—When it May be Filed.*—It is not error to allow an affidavit denying the genuineness of an indorsement to be filed after the evidence is closed, when the absence of such an affidavit is then for the first time urged as an objection to a finding in favor of alleged indorsee.

2. CHECKS—*Acceptance of—What Sufficient Proof of.*—Proof that a bank had paid a check to an unauthorized indorser and had charged it to the account of the drawer, who at the time of such payment had sufficient funds on deposit to meet it, constitutes sufficient proof of an acceptance of the check by the bank and renders it liable to the payee for the amount thereof.

3. INDORSEMENTS—*Authority to Make—Presumptions Regarding.*—Possession of a check affords no presumption of authority to indorse it, nor would authority to accept a check include either express or implied authority to indorse it, and the burden of showing the authority of a stranger to a check to indorse the same for the payee is upon the drawee if he would escape liability to pay it over again to the payee.

67	166
99	*112
67	166
199s	*165
199s	*166

Commercial Nat. Bk. v. Lincoln Fuel Co.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

SLEEPER, McCORDIO & BARBOUR, attorneys for appellant.

SPENCER WARD, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court rendered there upon an appeal from a similar judgment before a justice of the peace.

One H. L. Cooper drew his check upon the appellant for \$63.25, payable to the order of appellee in settlement of an account, and delivered the same to the firm of Allan F. Gordon & Co., who, then and before, acted as agents of appellee in the sale of coal, and as to certain customers, not including Cooper, in making collections for coal sold by them.

Having received the check in question, Gordon & Co. indorsed the same by the name of appellee, "per Allan F. Gordon & Co., Agts.," and deposited it to the credit of their own account in the Oakland National Bank, and the same was duly paid by the drawee, the appellant, in the regular course of business through the clearing house.

Gordon & Co. subsequently became insolvent, and upon demand made upon Cooper, by appellee, for payment of the account for which the check had been delivered to Gordon & Co., Cooper produced the said check as an acquittance.

Such indorsement being claimed by the appellee to be unauthorized, this suit was brought to recover from the drawee bank as though the check had never been paid.

It is urged that it was error to allow an affidavit denying the execution of the indorsement, to be filed by the appellee after the evidence was closed.

We regard the point as being more technical than meri-

torious. So far as the record discloses, no objection on that score, to the evidence that had been adduced on the question of the indorsement being unauthorized, was made until the evidence on both sides was closed, and was then, for the first time, urged as an objection to a finding in favor of the appellee as plaintiff.

So soon as the objection was made, the court gave leave to the appellant, as defendant, to file the affidavit, which was, we think, in apt time.

The further objection that the justice of the peace had no right to enter judgment for the plaintiff for want of an affidavit denying the execution of the indorsement, and that the Superior Court could not remedy an omission of that kind before the justice, is frivolous, and if it were not, the point not being made in the Superior Court could not be made here for the first time.

It is next contended that there is no evidence that at the time the check was presented to appellant by the appellee for payment, there were funds to the credit of the drawer sufficient to pay the check.

It being made to appear that the bank paid the check upon its presentment, after the unauthorized indorsement by Gordon & Co., and charged the amount to the account of the drawer, who then had sufficient funds on deposit to meet it, and who afterward lifted the check in settlement with the bank, constituted sufficient proof of an acceptance of the check by the bank, in this suit brought by the payee against the bank. *Jackson v. Bank*, 92 Tenn. 154.

It is further argued that Gordon & Co. had authority to indorse the check and collect it. It might well be, that if Gordon & Co. had authority to make collections for coal they had sold for appellee, it would be immaterial whether they had express authority to indorse checks received by them in the course of making such collections—the payment to them of the check amounting, in such case, to a collection which they had authority to make, and the method or means of making such collection being something which their principal could not escape the effect of.

But the mere fact that Gordon & Co. had possession of the check affords no presumption of their authority to indorse it, nor would mere authority possessed by Gordon & Co. to accept checks from customers of appellee for coal sold, give to them either express or implied authority to indorse such checks by the name of appellee. And if the drawee of such a check pays the same upon an indorsement that is not genuine, or is not authorized, it does so at its peril, and the burden of showing the authority of the stranger to the check to indorse the same for the payee, would be upon the drawee, if it would escape liability to pay it over again to the payee. *Jackson v. Bank, supra.*

Whether there was any express authority to Gordon & Co. to indorse and collect checks delivered to them, but made payable to the appellee; or whether from the course of dealing between appellee and Gordon & Co., such authority might be implied, were questions which the Superior Court decided after full hearing and consideration, and we do not feel justified in overturning the conclusion there reached, but must affirm the judgment.

67	169
170s	82

Chemical National Bank v. World's Columbian Exposition.

1. **ESTOPPEL**—*Acceptance of Part Payment of an Allowance.*—Where a claim against an insolvent national bank, part of which was unquestioned, the remainder being in dispute, was filed with the comptroller of the currency and he allowed the part which was not disputed and did not pass upon the remainder, but ordered that everything about which there was question should be thrown out of consideration, leaving all such questions to be settled by suit, *it was held*, that under the circumstances the acceptance of dividends on the amount allowed by the comptroller did not estop the claimant from prosecuting a suit to recover the amount in dispute.

2. **BANKS**—*Insolvency is Breach of a Contract to do a Banking Business.*—The insolvency of a bank being declared, its capacity to do business is at an end, and no further act is required to complete its liability for the breach of a contract requiring it to carry on a banking business.

VOL. 67.] Chemical Nat. Bk. v. World's Columbian Exposition.

Assumpsit, on the common counts. Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 5, 1896.

HIRAM T. GILBERT, attorney for plaintiff in error.

WALKER & EDDY, attorneys for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment of \$7,500, recovered against the plaintiff in error, and in favor of the defendant in error, upon a trial had before the court below, without a jury.

The cause was tried upon an agreed statement of facts, the substance of which, so far as necessary to be considered here, and the points urged against the judgment, we take from the brief of the plaintiff in error as follows:

"On July 7, 1892, the plaintiff, a corporation organized for the purpose of conducting the Columbian Exposition, entered into a contract in writing with the defendant, a national banking association organized under the laws of the United States, by which the plaintiff, on its part, agreed to set apart and allot to the defendant, certain premises in the Administration building, in Jackson Park, and to grant and concede to the defendant the exclusive right to conduct a general banking business and maintain safe deposit vaults upon the premises from the day the premises should be ready for occupancy during and until the close of the World's Columbian Exposition, or for so long thereafter as the plaintiff might deem expedient. The plaintiff further agreed that it would not permit any person or persons, corporation or corporations to carry on the business of cashing drafts or issuing exchange, or receiving deposits upon the Exposition grounds. The defendant, on the other hand, agreed for and in consideration of the grant of the above mentioned privileges to pay the defendant the sum of \$11,500 in installments as follows, to wit: \$2,000 February 1, 1893; \$2,000 March 1, 1893; \$2,000 April 1, 1893; \$2,500 May

1, 1893, and \$3,000 June 1, 1893. The defendant further agreed that it would commence the full operation of business, under the privileges granted in the contract, on or before the 15th day of April, 1893, and maintain the same continuously during the Exposition.

The contract contained no provision respecting the remedy that might be adopted by either party in case of a breach of any of the terms of the contract by the other.

On April 17, 1893, defendant entered into possession of the premises mentioned in the agreement, and established therein a branch office of its bank, conducting and carrying on a general banking business, receiving as deposits large sums of money from the plaintiff, concessionaires, exhibitors and others connected with the World's Columbian Exposition. It paid plaintiff on account of the contract \$2,000 February 1, 1893; \$2,000 March 1, 1893, and \$2,000 April 1, 1893, but never made any further payments.

On May 9, 1893, defendant became insolvent, and by direction of the comptroller of the currency a bank examiner took possession of its assets and property, and its business of banking was entirely suspended and was never thereafter resumed. The premises mentioned in the contract were closed, and the deposits were removed to the main banking office of defendant, in Chicago.

The bank examiner retained the management of the assets and property until July 21, 1893, when one John P. Hopkins was appointed receiver by the comptroller of the currency, and assumed the management thereof. Hopkins resigned January 13, 1894, and one Elie C. Tourtelot was appointed receiver in his place. Tourtelot continued to act as receiver until February 15, 1896, when he resigned, and one William C. Niblack was appointed receiver, and entered upon the discharge of his duties as such, and has ever since continued to act, and is still acting, as receiver.

On May 9, 1893, being the date of its suspension, plaintiff was a depositor of defendant to the amount of \$29,343, deposited in its name, and to the further amount of \$500, deposited in the name of plaintiff's paymaster.

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On the same date one Newton Wilcoxon was a depositor to the amount of more than \$1,000, and afterward, on July 5, 1893, Wilcoxon drew his check on the defendant for \$1,000, payable to the plaintiff's order, and delivered the same to plaintiff.

On June 23, 1893, plaintiff, through its proper officer, made demand upon the national bank examiner for the possession of the premises described in said contract. Thereupon, in pursuance of said demand, and by direction of the comptroller of the currency, the national bank examiner surrendered up possession of the premises, and after that date, defendant did not, itself, or by any agent or receiver, have control of the premises, or any part thereof, but on the contrary, from and after that date until the close of the World's Columbian Exposition, on November 1, 1893, the plaintiff, or the Northern Trust Company, of Chicago, had exclusive possession of the premises, and the Northern Trust Company, during said period, carried on in said premises a general banking business, with the express permission of the plaintiff.

After defendant had become insolvent and suspended business, plaintiff entered into negotiations with other banks and banking institutions, for the purpose of establishing a branch bank on the premises, and to this end entered into a contract with the Northern Trust Company, under which said Trust company undertook and agreed to open a branch office and conduct a general banking business on said premises when the defendant should surrender possession thereof, but upon the condition that said Northern Trust Company should not be required to pay any rent for the use of said premises, or for any rights or privileges that had been reserved to the defendant. Plaintiff made application to other banks and banking institutions for the prosecution of said business during the remainder of the term of said Exposition, but was wholly unable to obtain any other or more favorable terms from any responsible bank than those offered by said Northern Trust Company.

At the time plaintiff demanded possession of the premises from the bank examiner, the bank examiner and the directors of defendant made the claim that in consideration of such surrender of possession, defendant should be repaid a portion of the amount that had heretofore been paid by it to plaintiff on account of the contract, but plaintiff declined to recognize such claim or to repay any portion of said money.

On September 26, 1893, plaintiff presented and filed with Hopkins, receiver, its sworn proof of claim in and by which it claimed a balance due it on account of its deposit, amounting to \$29,343, the amount of the check delivered to it by Wilcoxon on July 5, 1893, amounting to \$1,000, and the amount of the deposit standing in the name of its treasurer amounting to \$500, making a total of \$30,843, then claimed by the plaintiff.

After this claim was filed the defendant's receiver insisted there should be deducted therefrom the sum of \$2,275, on the ground, as he claimed, that defendant should only be charged with such a proportion of the entire sum provided to be paid under its said contract as the time from April 17, 1893, to June 23, 1893, bore to the entire period from April 17, 1893, to November 1, 1893, which, as said receiver claimed, would amount to \$3,225, deducting which from the \$6,000 already paid, would leave the \$2,775 which the receiver claimed should be deducted. Subsequently the receiver expressed himself willing to allow the claim if plaintiff would first allow a credit thereon of \$2,100.

Failing to reach an agreement with the receiver, the attorney of the plaintiff, on January 15, 1894, communicated by letter with the comptroller of the currency relative to the differences between the plaintiff and the receiver, and requesting directions to the receiver before taking further action in the matter. In answer to this letter the comptroller, on February 5, 1894, wrote to the plaintiff's attorney in substance, that after hearing from the receiver and after having given the matter careful consideration, he was of the opinion that if the receiver could effect a compromise

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by deducting \$2,100 from the claim, he would be justified in doing so, but that if this could not be done, the proper course for him to pursue would be to deduct from the claim the entire \$6,000 paid by the defendant to the plaintiff, and allow it for the balance of \$23,343, leaving it to the plaintiff, if dissatisfied, to adopt such course as it might see fit for the determination of the rights of the parties by a court of competent jurisdiction.

Subsequently, and on February 13, 1894, plaintiff's claim was allowed to the amount of \$23,343, and the receiver issued and delivered to plaintiff a receiver's certificate therefor, which receiver's certificate was accepted by the plaintiff, and on February 15, 1894, plaintiff received from the comptroller of the currency, out of the funds of the defendant in the treasury of the United States, two dividends on the claim so allowed, aggregating the amount of \$16,340.10.

On April 12, 1894, nearly two months after the acceptance by the plaintiff of these dividends, it commenced the present suit. Subsequently, on June 26, 1894, plaintiff accepted a further dividend of \$2,334.30, and on August 9, 1895, a further dividend of \$1,167.15, making in all \$10,841.55 received by the plaintiff as dividends on the claim so allowed."

Upon the foregoing facts the defendant insisted that the plaintiff was not entitled to recover.

First. Because by its acceptance of dividends on the claim as allowed before the commencement of its suit, plaintiff had estopped itself from asserting any further claim against the defendant, or insisting that the action of the comptroller was erroneous.

Second. Because the amount of its claim, as allowed, and upon which it had received dividends, was all the plaintiff was legally entitled to.

The first proposition presenting, concededly, a new question, claims serious consideration.

Section 5234 of the Revised Statutes of the United States provides for the appointment, by the comptroller of the currency, of a receiver for an insolvent national bank. Section 5235 provides for the giving of notice by the comp-

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troller, by advertisement, to creditors, to present their claims. Section 5236 is as follows:

“From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives in proportion to the stock by them respectively held.”

It has been held that under this section the creditor was at liberty to present his claim to the comptroller for allowance, and that in case the comptroller refused to allow the claim, the creditor might bring suit thereon against the banking association in any court of competent jurisdiction. *Bank of Bethel v. Pabquioque Bank*, 14 Wallace, 383.

And an attempt was made, in the same case, to procure a holding by the court that the remedy given by that section of the statute, for proving claims before the comptroller of the currency, excluded all other remedies. But the court refused to sustain the proposition in that behalf, on the ground that under the provisions of the section quoted, it was as much the duty of the comptroller to make dividends upon claims that had been adjudicated in a court of competent jurisdiction, as upon such as had been proved before him to his satisfaction, and denied that the adjudicated claims referred to in the act were only such as had been adjudicated prior to the appointment of a receiver; and accordingly held that “claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity, and to determine the amount owed by the association.”

But that decision, it will be seen, does not meet the exact

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case presented by the proposition of the plaintiff in error, that by the acceptance of dividends on a claim allowed by the comptroller an estoppel arose against asserting the claim against the insolvent association for an amount in addition to what had been allowed by the comptroller.

Looking at the stipulated facts, we see that at the date of the suspension of the bank the defendant in error was a depositor therein to the extent of \$29,343 deposited in its own name, and of \$500 deposited in the name of its paymaster. Subsequently it became the holder of a check for \$1,000, drawn in its favor by one Wilcoxon, who was also a depositor in the bank to an amount in excess of the amount of the check.

Defendant in error was, therefore, a creditor of the bank to the amount of \$30,843, for funds on deposit when the bank failed, and was such creditor when it made presentation of its claim for allowance.

Against the claim as presented, the bank urged its counter-claim for a part of the \$6,000 it had paid on account of the concession it had received to occupy a banking office and do a banking business within the Exposition grounds.

Failing to come to an agreement as to such counter-claim, the comptroller allowed the claim of defendant in error for an amount equaling the \$29,343 on deposit in its name, less the whole \$6,000 which had been paid by the bank on account of the concession, viz., for \$23,343, and overlooked or ignored the items of \$500 on deposit in the name of the paymaster of defendant in error, and of \$1,000 for which it held the check of Wilcoxon.

The Exposition was, therefore, subjected to a clear deprivation of \$1,500, growing out of transactions entirely independent of, and separate from, its claim as a separate depositor in its own name, and was deprived of the \$6,000 which had been paid to it by the bank on account of rent and the concession. And it was for these sums that the defendant in error sued and obtained the adjudication in its favor that is brought up for review.

Whatever the rule may be concerning the binding effect upon one of an election made by him to accept the benefit

of a judgment or award in his favor upon an entire claim asserted by him, evidenced by his acceptance of subsequent dividends thereon, or of payment thereof, still we must regard the suit or claim for this \$7,500 as being so far separable from, and independent of, the claim of defendant in error as a general depositor of the bank, as to permit a recovery in the suit, notwithstanding, either before or pending such suit, dividends upon the claim as allowed by the comptroller were received.

A fair construction, also, of the letter of the comptroller of February 5, 1894, to the attorney of the defendant in error, in which he says that he is of the opinion that if the receiver could effect a compromise and adjustment of the controversy by deducting \$2,100, he would be justified in so doing, and adds, "If, however, this can not be done, the proper course for him to pursue will be, for him to deduct from the claim the entire \$6,000 paid by the bank to the Exposition, and allow it for the balance of \$23,343, leaving to the Exposition, if dissatisfied, to adopt such course as it may see fit for the determination of the rights of the parties by a court of competent jurisdiction," coupled with the action taken by defendant in error in accepting the course indicated by the comptroller, seems to be very close to a stipulation that defendant in error should abide by the decision of the comptroller to the extent of \$23,343, and sue for the rest, if dissatisfied; and it is conceded by counsel for plaintiff in error that it would be competent to make such a stipulation. But we do not regard it to be necessary to hold that a stipulation to such effect was made. It is enough that the matters involved in the suit do not appear to have been passed upon by the comptroller in making the allowance ordered by him.

He simply ordered that everything in dispute should be thrown out of consideration, leaving all such disputes to be settled by suit.

Under such circumstances we do not regard the defendant in error as being estopped by anything it has done from the recovery it secured.

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The case of *The Chemical National Bank v. Armstrong*, 59 Fed. Rep. 372, decided by the Circuit Court of Appeals for the Sixth Federal Circuit, and *White v. Knox*, 111 U. S. 784, are cases which, though not in precise point, appear by analogy to establish that estoppel will not operate in a case like the present one, but we take time only to refer to them.

Upon the second point, which involves the right of the defendant in error to have the \$6,000 which had been paid to it by the bank on account of rent and concession, it is urged that there was no lawful rescission by the defendant in error of its contract with the bank, and because there was not, that defendant in error could not repudiate the contract, and also retain the benefits it had received thereunder.

We will not follow out the argument of the plaintiff in error upon that point, but content ourselves with holding that from a full inspection of the stipulated facts, it appears that there was an admitted breach of the contract by the bank to such an extent as to put an end to its further execution by the bank, and that there had occurred a total disability of the bank to perform the objects for which the contract was entered into.

Upon the insolvency of the bank being declared, its capacity to do business was at an end, and the contractual relation between the parties ceased, except for purposes of an action for damages for breach of contract. *White v. Knox, supra*; *L. S. & M. S. Ry. Co. v. Richards*, 152 Ill. 59.

That the defendant in error suffered damages, was amply shown by the stipulation that it was thereafter unable to procure a bank capable of doing the business contemplated by the contract, at any rent whatever to be paid.

Under the agreed facts it would seem that there can be no doubt but the defendant in error had the right to take possession of the premises, after the total breach by the bank of its contract, as it did do under the direction of the comptroller, without having deducted from its claim what had been paid to it for rent and concession.

Upon the whole record the judgment should be affirmed, and it is so ordered.

**Garrie S. French v. Bellows Falls Savings Institution
et al.**

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1. **EQUITY PRACTICE—Cross-bills—When They May be Filed.**—A cross-bill is the only means, in equity practice, for a defendant to interpose matters arising after the filing of the original bill, by way of defense and for affirmative relief.

2. **SAME—Interlocutory Orders—An Order Dismissing Cross-bill is Interlocutory.**—An order sustaining a demurrer to a cross-bill, and dismissing it, is interlocutory, and not reviewable so long as the original bill is undisposed of.

3. **SAME—Dismissal of Original Bill—Effect on Cross-bill.**—The connection of the matter of a cross-bill with the subject-matter of the original bill, gives the court jurisdiction of the cross-bill, of which it can not be ousted by a dismissal of the original bill.

4. **SAME—Cross-bills, to Enforce Legal Rights—When Maintainable.**—Although a cross-bill sets up purely legal rights, the original complainant, having brought the complainant in the cross-bill into equity upon matters of purely equitable cognizance, can not be heard to question the jurisdiction of equity over the matters set up in the cross-bill, if they be germane to the original bill.

5. **PROMISSORY NOTES—When Payment is Ground for Cancellation by Court of Equity.**—The maker of a note which has been paid by a third party, in accordance with an agreement between said persons, should not be required to wait an attack, but should be entitled to use the facts upon which he relies, if they be sufficient, as an offensive weapon to obtain the cancellation and surrender of the note.

Bill, to foreclose a mortgage, and cross-bill to cancel note. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed November 30, 1896.

S. A. FRENCH, attorney for appellant.

The cross-bill presented new facts connected with the subject-matter of the original bill, and defendants to cross-bill should have been required to answer it. *Jones et al. v. Smith*, 14 Ill. 229; *Hurd v. Case*, 32 Ill. 45; *Robbins v. Swain*, 68 Ill. 197; *Higgins v. Curtis et al.*, 82 Ill. 28.

It is an elementary rule that when a court of chancery once obtains jurisdiction of a cause, it will retain it for all

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the purposes of complete justice between the parties. *McConnell v. Ayers*, 3 Scam. 210; *Rawson v. Fox*, 65 Ill. 200; *Leach v. Thomas*, 27 Ill. 457.

STILLMAN & MARTYN, attorneys for Bellows Falls Saving Institution, Peyton R. Chandler and Frank R. Chandler, appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee Savings Institution filed its bill to foreclose a trust deed in the nature of a mortgage, made by the appellant to secure his note for \$7,000, dated September 1, 1890, and due September 1, 1895, and alleged that one of the defendants in the foreclosure suit, Ida F. Henkel, had become the owner of the mortgaged premises by purchase, and had assumed and agreed to pay the mortgage indebtedness as a part of the consideration or purchase money to be paid by her, and prayed for a foreclosure and for a deficiency decree, and execution thereon, against all the defendants found to be liable for the mortgage indebtedness.

In that suit to foreclose, the appellant filed his cross-bill setting up matters of defense, and for affirmative relief arising after the filing of the bill.

The cross-bill alleged, in substance, that about two years after the making of the trust deed by appellant, he sold and conveyed the mortgaged premises to said Ida F. Henkel, who assumed and agreed to pay the mortgage indebtedness with interest after July 1, 1892, and who subsequently paid interest thereon after that date up to January, 1895, and that she thereby became primarily liable to pay any deficiency which might be decreed in the said foreclosure proceedings; that after said bill to foreclose was filed, the said Henkel, in pursuance of an agreement entered into between herself and Chandler & Company, who were then and there the Chicago agents of the appellee Savings Institution in that behalf, conveyed by deed to Peyton R. Chandler, a member of the said firm of Chandler & Company, her equity

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of redemption in said premises for the benefit of and in trust for said Savings Institution, which conveyance, it was averred, was made for a consideration of \$250, in cash paid to her by the Savings Institution, or by Chandler & Company in its behalf, and in full accord and satisfaction, and in full payment of the mortgage indebtedness; and it was averred that it then and there became the duty of Chandler & Company, acting for the Savings Institution, to cancel and surrender appellant's note which evidenced said indebtedness, but that after said conveyance was made and delivered, said Chandler & Company, with the knowledge and approval of the Savings Institution, collusively refused to so cancel and surrender said note; and it was prayed that said Savings Institution and Chandler & Company, or one of them, be decreed to cancel and surrender said note to appellant.

On the same day that the cross-bill was filed, but whether before or after the filing of the cross-bill the record is silent, the bill to foreclose was dismissed on the motion of the complainant Savings Institution; but, some five or six days later, such order of dismissal was vacated upon motion of appellant, presumably on the ground that the filing of the cross-bill operated to hold the original bill, and the defendants to the cross-bill were ruled to plead, answer or demur thereto, within five days.

The Savings Institution and the Chandlers demurred to the cross-bill, and their demurrer was sustained, and the cross-bill was dismissed, from which order of dismissal appellant prayed an appeal; but subsequently withdrew such prayer, and thereupon the original bill was dismissed, on complainant's motion, at complainant's costs. From such final decree of dismissal this appeal is prosecuted.

A cross-bill is the only means, in equity practice, for a defendant to interpose by way of defense and for affirmative relief, matters arising after the filing of a bill, as is a plea of *puis darrein continuance* of matters occurring between the declaration and the plea, in a suit at law. 1 Daniell's Chan. Pl. & Pr. 607; Story's Eq. Pl., Sec. 393; Puterbaugh's

Chan. Pl. & Pr. (4th Ed.), 366; Ferris v. McClure, 36 Ill. 77; Cross v. DeValle, 1 Wall. 5.

The appeal from the decree dismissing the original bill, brings up for review the question of whether the cross-bill was properly dismissed. The order sustaining the demurrers to the cross-bill, and dismissing it, was but interlocutory, and was not reviewable so long as the original bill stood undisposed of. Sholty v. Sholty, 140 Ill. 81; Fleece v. Russell, 13 Ill. 31; McMahon v. Quinn, 140 Ill. 199; Elliott's Appellate Procedure, Secs. 81, 120; but see *contra*, Lehman v. Ford, 47 Ala. 733.

Although in a limited sense the order sustaining the demurrer was a final one, yet it was not until the original bill was disposed of that it was final, in the sense of being appealable. See Webster v. Spindler, 36 Mo. App. 355.

We waive the question whether, after a cross-bill has been filed and dismissed upon demurrer, the complainant may, upon his own motion and without the consent of the cross-complainant, dismiss his original bill at his own costs, which may perhaps be said to be involved in some uncertainty. Sec. 36 of the Chancery Act; Gage v. Bailey, 119 Ill. 539; Mohler v. Wiltberger, 74 Ill. 163; Flaherty v. McCormick, 123 Ill. 525; Ralls v. Ralls, 82 Ill. 243.

According to the statement of the case in Ogle v. Koerner, 140 Ill. 170, a cross-bill was dismissed upon demurrer for want of equity, and thereupon the original bill was dismissed on motion of the complainants. And it was there held, as we understand the opinion, that it would have been error to have denied the motion of the complainants to dismiss their original bill under such circumstances; and it was said: "If it be assumed that the cross-bill in this case was properly dismissed, the court committed no error in allowing the complainants in the original bill to dismiss their bill on their own motion, and at their own costs."

"It may be, if this court should be of the opinion that the cross-bill in this case was improperly dismissed, and should reverse the decree in that respect, so as to reinstate the cross-bill, that the complainants in that bill would have

a right to insist upon the vacation of the order dismissing the original bill, so as to restore the case upon both bills to the position in which it stood before the commission of the error. But until it is found that the cross-bill is improperly dismissed, the order dismissing* the original bill can not be disturbed."

It does not seem as though it would be a reasonable interpretation of the statute, that "no complainant shall be allowed to dismiss his bill after a cross-bill has been filed, without the consent of the defendant," to hold that after a dismissal of the cross-bill upon demurrer, the complainant's control of his original bill should not revest in him, and he be allowed to dismiss it precisely as though no cross-bill had been filed; and we therefore follow the course pursued by the Supreme Court in the case last cited and proceed to the inquiry whether the cross-bill of the appellant was, or not, properly dismissed as for want of equity. If we conclude that it was not, then, under the suggestion quoted, the appellee Savings Institution may, if it chooses, move the Superior Court to vacate the order dismissing the original bill and the cause can proceed upon both bill and cross-bill as if neither of them had ever been dismissed.

We do not intend, however, to be understood to hold that it will be necessary, if the cross-bill be reinstated, that the decree of dismissal of the original bill be also set aside, as a precedent necessary to a hearing of the cross-bill upon its merits.

It has been frequently held that where the cross-bill sets up, as it may, additional facts not alleged in the original bill, relating to the subject-matter, and prays for affirmative relief against the plaintiff in the original bill on the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition as if it had been filed as an original bill; or, in other words, when the cross-bill partakes more of the nature of an original bill than of a mere defense, the dismissal of the original bill will not necessarily carry the cross-bill with it. 2 Daniell's Ch. Pl. and Pr. (5th Ed.), 1553, note 3; note *a* to Sec. 399, Story's Eq. Pr., and cases cited.

So in *Ladner v. Ogden*, 31 Miss. 332, it was said:

“When a cross-bill is filed for relief, separate and independent of the original bill, but touching the same property or growing out of the same subject-matter involved in the original bill and involving the rights of the co-defendants to the original bill, the dismissal of the original bill would not necessarily dismiss the cross-bill; because it is, in legal effect, more of the nature of an original than of a cross-bill.”

Such remarks were made, too, in a case where the original bill was not dismissed after a hearing upon the merits, as being without equity, and therefore by the act of the court, but upon order of the complainant.

Again in *Ragland v. Broadnax*, 29 Grat. (Va.) 401, quoting from 2 Barb. Ch. 129, it is said: “The connection of the matter of a cross-bill, be it *per se* legal or equitable, with the subject-matter of the original bill, gives the court jurisdiction of the cross-bill, of which it can not be ousted by a dismissal of the original bill.”

Now in this case, even though it may be, as set up in the cross-bill, that the Savings Institution, having taken to a trustee for its use all of the equity of redemption which it could acquire by a foreclosure of the mortgage, and because thereof, become barred of a right to proceed upon the original bill (see *Funk v. McReynolds*, 33 Ill. 481), and should, therefore, not desire in any event to have the decree dismissing its own bill upon its own motion set aside, yet if the cross-bill be reinstated there would seem to be, under the authorities cited, every reason why the cross-bill alone might be proceeded upon to obtain the affirmative relief it seeks, without the presence of the original bill in the suit, the cross-bill being for relief allowable under an original bill, if filed for that purpose, and as said in *Ladner v. Ogden*, *supra*, “more of the nature of an original than of a cross-bill.”

That the matters set up in the cross-bill were germane to the original bill, is not denied, but it is contended that the matters stated do not constitute a case calling for equitable relief.

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The sole scope and object of the cross-bill was to obtain a surrender of the negotiable note made by the appellant and secured by the trust deed. Under certain circumstances such would be a clear right of appellant, by original bill, and as the court had jurisdiction of the subject-matter and of the parties, one of whom was a non-resident, alleged to be a Vermont corporation, it would be unjust to compel the institution of a new suit in equity for the sole purpose of obtaining what can be as well decreed in this suit with all parties already in court. *Quick v. Lemon*, 105 Ill. 578 (p. 587).

The appellees contend that, if what is alleged in the cross-bill be true, the appellant has a complete remedy at law by defending against any suit that may be brought against him upon the note. Perhaps he might have a good defense to such a suit at law, but that fact does not oust the equity court of its jurisdiction acquired under the original bill.

Though the matters stated in the cross-bill were purely of legal rights, the original complainant having brought the appellant into equity upon matters of exclusive equitable cognizance, it can not now be heard to question the jurisdiction of the equity court over the matters set up by appellant in his cross-bill. *Quick v. Lemon*, 105 Ill. 578; *Story's Eq. Pl.*, Sec. 399.

Appellant ought not to be required to await an attack, but should be entitled to use the facts upon which he relies, if they be sufficient, as an offensive weapon to obtain equitable relief, to wit, the cancellation and surrender of his outstanding and paid note. *Pomeroy's Eq. Juris.*, Secs. 105 and 1375, *et seq.*

But it is further insisted that the agreement stated in the cross-bill in no manner inured to the benefit of the appellant, and that there was no privity between appellant and any of the parties to the agreement.

The appellant was the maker of the note, and Henkel had assumed and agreed to pay it as part of the purchase price agreed by her to be paid for the conveyance of the

mortgaged premises by appellant, to her, and as between appellant and Henkel, the latter had become the principal debtor, and appellant a surety.

There was thus a clear privity between appellant and Henkel with reference to the indebtedness, and what might be done by either with reference to it, directly affected the other, and payment of the note by Henkel would most clearly inure to the benefit of appellant.

What we have said, substantially disposes of all the objections that have been urged against the cross-bill, and examining that pleading with reference to the views we have expressed, we must hold that upon its face it disclosed equities, the truth of which should have been inquired into and determined upon a hearing.

The decree dismissing the original bill, which is the decree appealed from, is, therefore, reversed, with directions to the Superior Court to reinstate the cross-bill, and permit, if desired, issues as to its merits to be formed and heard. Whether the complainant in the original bill shall elect to proceed further with its prosecution, and it should be permitted to do so if it so elect, we regard as being immaterial to the right of the appellant to have a determination of the issues presented by his cross-bill; but in view of what we have said, it will be the safer course for the Superior Court to refuse to allow the original bill to be again dismissed, except upon a final decree adjudging the merits of the cross-bill in connection with it.

The decree of the Superior Court is accordingly reversed and the cause remanded.

**Chicago Trust & Savings Bank v. Frank T. Kinnare,
Administrator of the Estate of Charles
F. Remick, Deceased.**

1. PARTNERS—*Power to Execute Judgment Notes.*—A member of a partnership can not execute in the firm name a valid power of attorney to confess a judgment unless specially authorized to do so.

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2. SAME—*Liability of Partners after Dissolution.*—Where a partnership is dissolved by the withdrawal of a member and the remaining partners continue to do business by the same name, without giving notice of the dissolution, they will be liable to third persons, not having notice of such withdrawal, or that such withdrawing member was acting for himself alone, for what he does in the firm name.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 5, 1896.

STATEMENT OF THE CASE.

On the first day of September, A. D. 1887, Wm. H. Ward, J. C. Goldthwaite and C. F. Remick entered into a copartnership, under firm of "Ward, Goldthwaite & Co." to engage in the business of "selling hats, caps and gloves at wholesale," in the city of Chicago, said partnership to continue three years from date.

Remick was the financial man of the firm, who furnished the bulk of the capital, or, as stated in the articles of agreement, "Remick being understood to be worth \$100,000, is expected to give strength and credit to said firm, so that it will have a first class rating and be able to purchase goods for said business at lowest prices, and also from time to time to advance moneys as he finds the convenience of said business may require, but said Remick is not expected, except at his own option, to give his personal services to said business."

The articles of copartnership contain the usual details as to the business, the respective duties of the three partners, and ample provisions against the improper uses of the firm name, and signed by the three parties named.

On the 2d day of January, 1889, one Solomon Herzog, was "admitted into and made a partner in the firm existing under the title of Ward, Goldthwaite & Co., composed of the first three above named persons;" the partnership to continue "four years from January 1, 1889, unless sooner dissolved by mutual consent or operation of law." Remick had \$18,000 in the business, "besides collateral

security held by a bank for the accommodation of said business for nominally \$20,000." Herzog was to put in \$10,000 by February 1, 1889. J. C. Goldthwaite agreed to "keep his capital already in said business up to the sum of \$5,000," and against this Ward put "his long experience in buying and selling, and his skill, especially with the western trade, * * * in lieu of cash." No member was to "gamble, bet or speculate on any board of trade under penalty of forfeiting his rights," and no member was to "use the firm name for anything except strictly firm business." The articles of agreement were signed by the four parties.

On the 10th day of June, 1889, by bill of sale, Herzog sold out his interest, "with the consent, in writing, of Ward and Goldthwaite," to Remick.

Goldthwaite went out of the firm June 10, 1889. He was thereafter employed in the house until about the 24th of February, 1890.

The business was continued under the old firm name of "Ward, Goldthwaite & Co.," Goldthwaite acting as bookkeeper and sometimes as a salesman. That is, until February 28, 1890, the date of the deed of assignment.

Goldthwaite's first transaction with the bank was on March 1, 1889, when the Chicago Trust & Savings Bank made a loan of \$2,500 for sixty days. This loan was discounted twelve times, and was finally paid in full.

The next transaction was June 1, 1889, a loan of \$2,500 for one month. The next August 1, 1889, the same amount. To some of these, notes with the firm name of Ward, Goldthwaite & Co., and to some of them notes with the name of Ward, Goldthwaite & Co. thereon, were given as collaterals, and on some of them notes with the name of Goldfaite & Sons, of Marion, Indiana, as collateral.

On April 30, 1889, the bank loaned J. C. Goldthwaite \$2,500 for thirty days. This was a personal loan with collateral. Tolman, the president of the bank, speaks of eight other transactions, to wit: One of August 25, August 31, September 30, October 25, October 30, December 6, December 21 and February 18. Some of these loans were per-

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sonal loans to J. C. Goldthwaite, with the note of Ward, Goldthwaite & Co. given as collateral, and others were personal loans to J. C. Goldthwaite, with Goldfaite & Sons as collateral.

The history of the note in suit at bar, is as follows: On the 23d of August, 1889, J. C. Goldthwaite, representing himself to be a member of the firm of Ward, Goldthwaite & Co., executed and delivered to the Chicago Trust & Savings Bank, the following promissory note:

“CHICAGO, February 18, 1890.

Thirty (30) days, no grace, after date, for value received, we promise to pay to the order of ourselves, twenty-five hundred dollars, with interest at the rate of eight per cent per annum, after due, having deposited with the legal holder hereof as collateral security, one note for \$3,000, dated February 18, '90, due sixty days after date, made by Ward, Goldthwaite & Co., to order of James C. Goldthwaite, and by him indorsed, and we hereby give the said legal holder, his, her or their assign or assigns, authority to sell the same or any part thereof, on the maturity of this note, or at any time thereafter, or before, at public or private sale, without advertising the same, or demanding payment or giving notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all the interest due thereon, and also to the payment of all expenses attending the sale of the said collateral, and in case the proceeds of the sale of the same shall not cover the principal, interest and expenses, we promise to pay the deficiency forthwith after such sale, with interest at eight per cent per annum. Said legal holder hereof, his, her or their assigns may purchase at any such sale. And it is hereby agreed and understood, that if recourse is had to said collateral, any money realized on sale thereof in excess of the amount due upon this note, shall be applicable to the payment of any other note or claim which the said legal holder may have against us, and in case of any exchange of or addition to the collateral above named, the provisions of this note shall extend to such new or additional collateral.

And to further secure the payment of said amount, we

hereby authorize, irrevocably, any attorney of any court of record to appear for us in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and five per centum attorney's fees, and also to file a *cognovit* for the amount thereof, with an agreement therein, that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue hereof, nor any bill in equity filed to interfere in any manner with the operations of said judgment, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment; and also to waive all benefit or advantage to which we may be entitled, by virtue of any homestead or other exemption law now or hereafter in force in this or any other State or Territory where judgment may be entered by virtue hereof. Hereby ratifying and confirming all that said attorney may do by virtue hereof.

WARD, GOLDTHWAITE & Co. [SEAL.]

\$2,500.

JAMES C. GOLDTHWAITE. [SEAL.]”

Upon the back of which are the following indorsements:

“April 5, 1890, sold the within described note to W. W. Charles for \$250.

D. H. TOLMAN, Pres.

\$2,250 due.

WARD, GOLDTHWAITE & Co.

24,778

JAMES C. GOLDTHWAITE.”

The signatures upon this note were made by Goldthwaite in the presence of Tolman.

The check, less the discount, was made out to Ward, Goldthwaite & Co., and delivered to J. C. Goldthwaite there and then.

The following stipulation was made in this suit:

“It is stipulated and agreed that the check for the notes signed in the name of Ward, Goldthwaite & Co., of August 23, 1889, was delivered to J. C. Goldthwaite, and was made payable to Ward, Goldthwaite & Co., and that said Goldthwaite took said check and indorsed it in the name of

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‘Ward, Goldthwaite & Co.,’ and drew the funds and wrongfully applied it to his own personal use, without the knowledge or consent of either Ward or Remick, or Tolman or the plaintiff.”

Neither the firm of Ward, Goldthwaite & Co., its successor, Ward or Remick, ever had any dealing with appellant.

Remick testified that Tolman went to Ward and Remick’s store on the 25th or 26th of February, 1890; it was the first time either of them had ever seen Tolman. He produced two sets of notes; one set consisting of the note sued on in this case, and the note sued on in the Charles-Remick case, (54 Ill. App. 116, 156 Ill. 327), the personal note of Goldthwaite for \$2,500 and the \$3,000 collateral thereto; the other set of notes, being another \$2,500 note of J. C. Goldthwaite, and a \$2,500 note collateral thereto of Goldfaite & Sons, of Marion, Indiana, dated November 8th. These four notes Tolman offered to sell to Remick for \$2,500. “He (Tolman) said that he had \$2,500 predicated on this paper, and that \$2,500 would make him even, and wanted me to buy it for that. He wanted me to buy the whole four pieces of paper for \$2,500. He said he had loaned upward of \$2,500, and that Goldthwaite had put up that collateral note, dated November 18th, and that he had bought some other notes; that Goldthwaite had left that paper expecting to get the Goldfaite & Sons paper.”

Goldfaite & Sons was a firm of Marion, Indiana, and was considered, and so Ward told Tolman, a firm good for a million.

Remick said to Tolman at the store: “It is a fortunate circumstance that you have that paper with that (Goldfaite & Sons) bogus signature on it, because it will probably be the means of your getting your money. I meant,” says Remick, “that they would have too much fear of a prosecution for forgery. I told him I would not give five cents for the whole lot; that Goldthwaite was not a partner and had no authority to sign the paper.”

Tolman went away, and Remick testifies: “About a month after, meeting me on Washington street, he said: ‘I have got

that pay; that Goldfaite & Sons' note. I have got the \$2,500.' I said: 'You are a good deal smarter about this thing than they were over at the American Savings Bank.'

Tolman replied: 'Yes, I have my pay; it was paid down at Marion, Indiana.' It was sent down there for collection; in other words, he got his money."

Tolman denies making the statements attributed to him by Remick.

The court found the issues for the defendant.

JOHN G. HENDERSON, attorney for appellant; MOSES, PAM & KENNEDY, of counsel.

"When a member of a partnership withdraws, if he fails to give notice of the fact, his liability will continue unless he can bring home notice to the person seeking to hold him liable. When he withdraws from the firm, he can terminate all future liability for its business, by giving notice to the correspondents of the firm, and, as to all others, by publishing a notice of the dissolution of the firm in the public newspapers of the neighborhood. Or, he may escape liability by proving that persons subsequently dealing with the firm had actual notice of his withdrawal or was not a member of the firm." *Ellis' Admrs. v. Bronson*, 40 Ill. 455; *Trigerthan v. Lohrman*, 6 Mo. App. 576; *Bowen v. Rutherford*, 60 Ill. 41; *Frohlich, Gardt & Co. v. Alexander*, 36 Ill. App. 434.

The burden of proof rests upon him who defends on the ground of dissolution, to prove notice of such fact. *Abbott's Trial Ev.*, 222; *Wade on Notice*, 491, Sec. 530; *Vernon v. Manhattan Co.*, 22 Wend. 193; *Daniel's Neg. Instr.*, Sec. 3693; *Southern v. Grimm*, 67 Ill. 106; *Podrasnik v. Martin & Co.*, 25 Ill. App. 303; *Meyer et al. v. Krohn*, 114 Ill. 574; *Lovejoy v. Spafford*, 93 U. S. 438, 442; *Parsons on Partnership*, 447, 448; *Wardell v. Height*, 2 Barb. 553; *More v. Dixon*, 59 Ill. App. 167, 170.

BARNUM, HUMPHREY & BARNUM, attorneys for appellee.

When the signing of the firm name by one partner in any transaction, after the partnership is dissolved, is done

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outside the ordinary course of the firm business, notice of the dissolution is not necessary to the obligee, and the contract will be void. *Spruck v. Leonard*, 9 Ill. App. 182; *Hicks v. Russell*, 72 Ill. 230; *Bradley v. Linn*, 19 Ill. App. 322; *Daniel on Neg. Inst.*, Sec. 358; *Chitty on Bills*, 58; *Block v. Price*, 24 Mo. App. 14; 17 Am. & Eng. Enc., 1124, 1125, 1126; *Clapp v. Rogers*, 12 N. Y. 283; *Merritt v. Williams*, 17 Kans. 287; *Vernon v. Manhattan Co.*, 22 Wend. 183; *City Bank v. McChessney*, 20 N. Y. 240; *Hutchin v. Bank of Tennessee*, 8 Humphreys (Tenn.), 418; *Nussbaumer v. Becker*, 87 Ill. 282; *Kallenback v. Dickinson*, 100 Ill. 436; *Bank of Montreal v. Page*, 98 Ill. 109.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This action is brought upon a forged signature to a promissory note.

Goldthwaite, who signed the name, Ward, Goldthwaite & Co., to the note, was not, when he did so, a member of the firm, nor had he any authority to sign such name, nor did the firm in any way receive any benefit from his signing, or have notice thereof.

Goldthwaite had been a member of the firm, and after his retirement therefrom, the remaining members had undoubtedly conducted themselves, by continuing to do business without notice of dissolution, and by the old name, so that to persons not having notice of his retirement, or that Goldthwaite was acting for himself alone, Ward and Remick would have been liable for what Goldthwaite did in the firm name.

Did appellant in respect to the note in suit, have such notice?

The note given to appellant was a judgment note, to which Goldthwaite signed the firm name, and also his own, all the signatures being made by Goldthwaite in the presence of Tolman, the president of the bank; it was payable to the order of the makers, and by Goldthwaite indorsed as it was signed.

Appellant knew that, unless specially authorized, Goldthwaite could not execute in the firm name a valid power of attorney to confess judgment; it also knew that if Goldthwaite was a member of the firm, he was bound by the firm signature without affixing his individual name.

We are not now called upon to say what we should have found had the case been tried before us, but whether the evidence is such that this court must set aside the finding of the Circuit Court that appellant had notice that Goldthwaite made the firm signature and obtained money thereon for his own private use; taking all the facts into consideration, we can not so say.

Remick, in testifying to the conversation had with Tolman at Remick & Ward's store on February 26th or 27th, said:

"The conversation was substantially this: He said that he had \$2,500 predicated on this paper (the four notes), and that \$2,400 would make him even and wanted me to buy it for that. He wanted me to buy the whole four pieces of paper for \$2,500. He said he had loaned upward of \$2,500, and that Goldthwaite had put up that collateral note dated November 18th, and that he had bought some other notes; that Goldthwaite had left that paper expecting to get the Goldfaite & Sons paper; that Tolman said he played sharp on him, and after he got the four notes he kept them."

Ward, referring to the conversation with Tolman at the store—the conversation testified to by Remick, said:
* * * "and Tolman said he wanted to get twenty-five hundred dollars on this sale, and that if he would give him that he would give up the notes, and there was four of them."

These two (meaning the note in suit and the one sued on in *Charles v. Remick, supra*), were two of the four. "The other two are in the hands of the firm of Goldfaite & Sons, of Marion, Indiana. I saw them the other day."

Tolman denies this.

The court below saw and heard the witnesses; we can

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not say that it was not warranted in finding, as we must presume it did, that appellant has received all that it loaned upon the faith of the forged signature of Ward, Goldthwaite & Co.

We do not regard the stipulation as an agreement that appellant did not have notice that Goldthwaite was using the firm name to obtain money for his private use.

The stipulation is merely that neither Tolman nor appellant consented or knew that he, Goldthwaite, wrongfully applied the money to his personal use.

If appellant had notice that Goldthwaite intended to apply the money to his personal use, although it may have believed that the firm had consented thereto, and that there would be no wrong in so doing, nevertheless it assumed the risk of there being such consent.

Appellant gave to Goldthwaite for the note a check payable to the order of Ward, Goldthwaite & Co., but as we understand, this check was upon appellant, and was by it paid.

The question in this regard turns upon whether appellant had notice that Goldthwaite was using the firm name for his personal ends. The previous dealing and all circumstances taken into consideration, we can not say that the Circuit Court erred in finding the existence of such notice.

The judgment of the Circuit Court is therefore affirmed.

Samuel Lewis and Peter Fishback v. Firemen's Insurance Company.

1. **MOTIONS—*How Made.***—Motions should be entered by the clerk, or filed, so that they can be called up by either party. Sending a written motion to a judge is not equivalent to filing it in his court, as the judge is not the custodian of the files or the keeper of the records.

2. **JUDGMENTS—*When Collection Not to be Enjoined.***—The collection of a judgment will not be enjoined, when, by the exercise of diligence, the party could have presented his defense.

Bill, to enjoin the collection of a judgment. Appeal from the Circuit

Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and decree entered. Opinion filed November 30, 1896.

STATEMENT OF THE CASE.

This is an appeal from an order of the Circuit Court of Cook County, overruling a demurrer to a bill for an injunction, and making perpetual a preliminary injunction theretofore granted.

The bill sets up that the appellee is a corporation organized and doing business in the State of Illinois. That on March 7, 1894, the appellee issued an insurance policy for \$1,000, upon the household goods, groceries, fixtures, etc., located at No. 395 South Desplaines street, in Chicago, to Samuel Lewis, the owner of said property, for one year from March 7, 1894. That on November 12, 1894, said goods were damaged by fire to the amount of \$48.15.

That on November 15, 1894, arbitrators were agreed upon between the parties, and said arbitrators adjusted said loss and damage at \$48.15.

That no proof of loss was furnished the company within thirty days after said loss by said Lewis, as provided in said policy of insurance, and that such proofs of loss were not furnished by said Lewis until January 11, 1895, and that said company was not, therefore, liable for any part of said loss.

But the said company offered and was ready and willing to pay the said Lewis the said sum of \$48.15, so found by said arbitrators to be the amount of said loss.

That said Lewis refused to abide by the award of said arbitrators, and refused to receive said sum of \$48.15 in satisfaction of said loss, but brought suit against said appellee before Justice Gibbons to recover for such loss, which was tried before said justice, and the jury returned a verdict of \$200 against said appellee.

That an appeal was duly prosecuted from said justice to the Circuit Court of Cook County, and said cause was placed on Judge Burke's docket as No. 139,787.

That on February 28, 1896, and at the February term of

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said court, upon the first call of the calendar before Judge Burke, and in the absence of U. P. Smith, the attorney for appellee, said appeal was dismissed for want of prosecution. That on same day appellee served notice upon the attorneys for said Lewis, that on the following morning, February 29, 1896, appellee would move to reinstate said cause upon the docket for trial, at which time the attorney for Lewis appeared, and the court placed the same upon the contested motion calendar for hearing on March 7, 1896.

That upon March 7, 1896, U. P. Smith, the attorney for appellee, who was still confined to his home by illness, prepared a written motion to reinstate said cause, together with his own affidavit in writing, stating in substance that in consequence of his illness on the day said cause was dismissed, he had sent his clerk to said court to state to the court that said cause was ready for hearing, but that said clerk arrived in court a minute or two too late to state this fact to the court until after the case was called; but that said clerk, Hector Streychman, then and there requested the court to reinstate said cause, and the court then and there stated that said cause would have to be reinstated upon affidavit.

The said U. P. Smith further stated that he was familiar with said cause and believed said company had a good defense to the same upon the merits, and would be ready to try the same whenever it should be reached for trial. That the affidavit of A. C. Collins, the secretary of the company, was also prepared, setting up that the company had a good defense to said suit upon the merits and would be ready to try the same whenever it was reached for trial upon the regular call of the docket.

That said U. P. Smith inclosed said motion and affidavits together with a personal letter, in an envelope directed to Judge Burke, stating that he was at home ill, and could not appear in court on that day, and asked said Judge to file said motion and affidavits and continue the hearing of said motion for one week on account of the illness of said Smith, which said motion and affidavits were delivered to Judge

Burke by the said Hector Streychman, and the court thereupon continued the hearing of said motion until March 14, 1896.

That said Smith was unable to attend court on account of illness until Saturday, March 21, 1896, but had sent his clerk, on Saturday, March 14, 1896, with a statement to the court that he, said Smith, was still too ill to be in attendance on that morning, and asked to have the hearing of said motion continued until the 21st day of March, 1896, which was done. That on the 21st day of March, 1896, said Smith appeared in court to call up said motion, but neither said motion nor the said affidavits filed therewith could be found.

That the term at which said suit had been dismissed, to wit, the February term, A. D. 1896, had expired on March 14, 1896. March 21st being one of the days of the March term of said court, and no motion or affidavits appearing to have been filed during the February term of said court, the court refused to take any action in the matter, saying that the term at which said appeal was dismissed had passed, and no motion appearing to have been made during the term to reinstate said cause, he had no power to act in the matter, unless said written motion and affidavits could be found.

That diligent search had been made by Judge Burke and the clerk of said court, and by U. P. Smith, for such written motion and affidavits, so delivered to said judge and filed in said cause as aforesaid, and upon which said motion to reinstate said cause was continued from time to time, as hereinbefore stated, and no trace can be found of said written motion and affidavits among the files and papers in said court, or in the judge's room, or in any other place, and that said written motion and affidavits have been lost, and said company has thereby been deprived of all right to have said cause reinstated upon the docket and tried upon its merits in said suit at law.

That said company has a good defense to said cause, and the whole of it, but certainly to all but \$48.15 of said claim,

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and has, by accident, or the loss of said motion and affidavits, been deprived of its right to a trial of said cause and without any fault on the part of said company, or on the part of its said attorney, and your orator is now ready and willing and hereby offers to pay the said defendant the said sum of \$48.15.

That said written motion and affidavits were presented to the court, and filed in said cause during the term at which said cause was dismissed, as hereinbefore stated, and at the time and in the manner hereinbefore stated, and entitled said company to call up said motion, and to reinstate said cause at the March term of said court, if said motion and affidavits had not been lost. That by reason of said loss and accident, said company has been deprived of its right to make its said defense to said cause in a court of law, and can have relief only in a court of chancery, etc.

That said Lewis has already caused execution to be issued upon said judgment in said justice court, and has caused the same to be placed in the hands of Peter Fishback for service, and said Fishback has already demanded of said company payment of said judgment, and has threatened and stated that unless at once paid, he will levy said execution upon said company's bank account immediately.

That said company's business is such that it is absolutely necessary in the conduct of the same to keep a bank account and to pay out and deposit large sums of money every day to different persons in the course of its business in order to conduct and manage the same, and that such levy would result in great and irreparable loss and damage to said company, and prevent the transaction of any business by said company. That to seize upon the company's bank account by means of said levy would inevitably result in permanent and irreparable loss and damage to said company in its business and financial credit.

That unless said Lewis shall be immediately enjoined from levying on said company's bank account, he will, within the next few hours, levy said execution upon said bank account, and that it is important that such injunction

be forthwith allowed without the formality of any notice to said Lewis.

That said Lewis is wholly irresponsible, pecuniarily, so that no damages said company might recover of him could be collected, and he has no property out of which any judgment recovered against him could be collected.

Prays for an injunction against Samuel Lewis, Peter Fishback and their agents, officers or servants, etc.

The bill was sworn to by A. C. Collins, secretary of the Firemen's Insurance Company, and by U. P. Smith.

The defendants filed a demurrer to said bill, setting forth that the company had not made or stated such a case as entitled it to any relief, because it had and has an adequate remedy at law, etc.

The demurrer was overruled by the court; the appellants elected to stand by their demurrer. The only question is whether the bill is good upon its face.

OLSON & BANTLE, attorneys for appellants.

A judgment will not be enjoined unless it is made to appear that it was both unjust, and that it was obtained without negligence on part of the defendant. *Walker v. Shreve*, 87 Ill. 474; *Sprague v. Lux*, 12 Ill. App. 271.

Something must have occurred to prevent a defense, and it must not have been remediable by the use of reasonable precaution and diligence. *Mallendy v. Austin*, 69 Ill. 15.

Nor does it make any difference that the omission is the negligence or mistake of counsel in the progress of the case. *Fuller v. Little*, 69 Ill. 229.

U. P. SMITH, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is perhaps to be regretted that in a great city like Chicago the business of courts can not be transacted as it once was in small country districts, where counsel and court, in a most commendable spirit of friendliness, waited for the

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convenience of each other. If a lawyer was ill, or wished to go fishing, not until he returned to labor was an effort made to force to trial causes in which he was engaged. In this city, he who stands still is run over; one must keep up with the procession, or get out of the way.

The bill of the complainant showed no excuse for the absence of his counsel February 28th, when his "appeal" was dismissed.

Counsel promptly gave notice of a motion to reinstate, which motion was set for hearing March 7th. Upon this day, counsel, being ill, prepared a written motion to reinstate the "cause," and his affidavit, stating that in consequence of his illness on the day the "cause" was dismissed, he had sent his clerk to state to the court that the cause was ready for hearing, but that the clerk arrived too late.

This motion and affidavit he, instead of filing, sent with a personal letter, to the judge of the court.

Now the appeal and not the cause was dismissed.

Yet the judge continued the hearing of the said motion to March 14th; and thereafter upon the application of the same counsel, continued it to March 21st, when, for the first time, counsel for appellee appeared in court to call up his motion to reinstate; but neither the motion nor the affidavits, which counsel had never filed, could be found. Thereupon the February term, at which the "appeal" was dismissed, having passed, "and no motion appearing to have been made during the term to reinstate said cause," the court refused to reinstate.

The bill presented no case for the interposition of a court of equity.

No excuse for not filing the motion to reinstate was shown.

The plaintiff was entitled, if such motion was to be considered, to have it entered by the clerk, or filed so that it could be acted upon, and called up by either party.

Sending it to the judge was not equivalent to filing in court. The judge is not the custodian of the files, or the keeper of the records.

By the exercise of reasonable diligence, the appeal would

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not have been dismissed, and a motion to reinstate would have been made at the February term.

A judgment will not be enjoined when, by the exercise of diligence, the party could have presented his cause. *Walker v. Shreve*, 87 Ill. 474; *Mallendy v. Austin*, 69 Ill. 15; *Fuller v. Little*, 69 Ill. 229.

The demurrer to the bill should have been sustained.

The decree of the Circuit Court is reversed, and a decree dismissing the bill will be here entered.

67 202
189 123

Supreme Council of the Royal Arcanum, Anna Tracy, Elizabeth Tracy and Agnes Tracy v. Mary Tracy.

1. **INSURANCE POLICY**--*Equity Will Relieve Assignee Against Fraudulent Transfer*.—An insurance policy is assignable in equity, and an assignee for value contending against mere volunteers, whose claim came into existence through the fraudulent conduct of their donor, has a clear right to relief, and it is not necessary that the holder of the fund who still retains possession of it should have been notified of the assignment.

Bill, to settle ownership of insurance money. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

STATEMENT OF THE CASE.

On August 26, 1885, one Thomas P. Tracy became a member of a council of the Royal Arcanum, and thereafter, to wit, on September 8, 1885, the Supreme Council of the Royal Arcanum issued to said Tracy benefit certificate No. 65,078, which certificate was as follows:

“ROYAL ARCANUM BENEFIT CERTIFICATE.

This certificate is issued to Thomas P. Tracy, a member of Northwestern Council No. 315, Royal Arcanum, located at Chicago, Illinois, upon evidence received from said council that he is a contributor to the widows and orphans'

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benefit fund of this order, and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the supreme secretary's office, be made a part of this contract, and upon condition that the said member complies in the future with the laws, rules and regulations now governing said council and fund, or that may hereafter be enacted by the supreme council to govern said council and fund, and upon condition that said member for himself, and for any person or persons accepting or acquiring any interest in this benefit certificate, agrees that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership in the Royal Arcanum, or on any benefit certificate, unless such action is brought within three years from the time when the right of action accrues. These conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay out of the widows and orphans' benefit fund, to Mary Tracy, wife, a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing said fund, upon satisfactory evidence of the death of said member, and upon surrender of this certificate, provided that said member is in good standing in this order at the time of his death; and provided, also, that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order.

In witness whereof, the Supreme Council of the Royal Arcanum has hereunto affixed its seal and caused this certificate to be signed by its supreme regent, and attested and recorded by its supreme secretary at Boston, Massachusetts, this 8th day of September, A. D. 1885.

H. H. C. MILLER,
Supreme Regent.

Attest: W. O. ROBSON,
Supreme Secretary.

I accept this certificate on the conditions named herein.
THOMAS P. TRACY."

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By chapter 4 (Title II) of the general laws of said supreme council, it is provided as follows:

“A member may at any time, when in good standing, pay a fee of fifty cents, make a written surrender of his benefit certificate and direct that a new certificate be issued to him payable to such beneficiary or beneficiaries as such member may designate, in accordance with the laws of the order.

“The written surrender and direction for change of beneficiary must be forwarded, under seal of the council, with the benefit certificate and fee of fifty cents, to the supreme secretary, who shall issue a new certificate in accordance with the direction of the member, if the direction is in accordance with the laws of the order.

“In case a benefit certificate is lost or beyond a member's control, the member may, in writing, surrender all claim thereto and direct that a new certificate be issued to him, payable to the same or a new beneficiary or beneficiaries, in accordance with the laws of the order, upon making affidavit of the facts in the case satisfactory to the supreme secretary and paying a fee of fifty cents.

“The change of beneficiary shall take effect upon the delivery of the benefit certificate, the written surrender and direction for such change, as provided in the laws of the order, the proof of loss, if required, and the fee of fifty cents to the regent, secretary, collector or treasurer of the council to which the member belongs.

“The issuing of a new benefit certificate, in accordance with the laws of the order, shall cancel and render null and void any and all previous certificates issued to a member.”

In accordance with said provisions, Thomas P. Tracy, on June 9, 1894, executed and delivered to the secretary of said Northwestern Council the following instrument:

“ROYAL ARCANUM.

To the Supreme Secretary, S. C., R. A.

Dear Sir and Brother: I hereby certify that my benefit certificate, No. 65,078, has been misplaced, lost, with other papers.

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I hereby surrender and renounce all claim thereto on behalf of myself, my family, and those dependent upon me, and request that a duplicate benefit certificate be issued by the Supreme Council, payable to Annie Tracy, Elizabeth Tracy, Agnes Tracy, my daughters, one thousand dollars each.

Given under my hand this 9th day of June, 1894.

THOMAS P. TRACY,
Member's signature.

Attest : J. J. KEENAN,
Secretary.

Subscribed and sworn to before me this 9th day of June, 1894.

T. P. KENNEDY,
Notary Public."

Thomas P. Tracy paid the supreme secretary the required fee of fifty cents.

The request for a change of beneficiary, together with the fee of fifty cents, was forwarded to the supreme secretary at Boston, Mass., and the proof that the original certificate had been lost, or was beyond the control of the member, being satisfactory to that officer, he thereupon, on June 14, 1894, issued to Thomas P. Tracy a new benefit certificate, by the terms of which the benefit which might become due thereunder was to be payable "to Annie E. Tracy, Elizabeth Tracy and Agnes Tracy, daughters of said Thomas P. Tracy, each one-third."

Thomas P. Tracy died September 21, 1894. It is admitted that at the time of his death he was a member in good standing of said Northwestern Council No. 315.

Thomas P. Tracy was married twice. Three of the children of his first wife are the appellants, Annie Tracy, Elizabeth Tracy and Agnes Tracy. The appellee was his second wife. She was a widow at the time she married Tracy in 1882. The evidence shows that at the time of her marriage with Tracy she had about \$1,500; that Tracy had some money, but not a large amount, and that in the summer or fall of the year 1885, he purchased with the joint money of

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himself and wife, she contributing the said \$1,500, the real estate described in the bill of complaint. The evidence further shows that Tracy agreed that if she would contribute said sum of money toward the purchase of said real estate, he would join the Royal Arcanum, from which he would receive a benefit certificate for \$3,000, and that he would deliver it to her; that he did join, as above stated, Northwestern Council No. 315, and receive and deliver to appellee the benefit certificate, a copy of which is herein given, and that appellee kept said certificate locked up in her trunk, and beyond his control, until after her husband's death. It further appears that appellee paid the greater part, if not all, of the assessments which were due under said certificate amounting in the aggregate to about \$500. The bill alleges, and the proof introduced seems to support the allegation, "that in order to induce your oratrix to permit said Thomas P. Tracy, deceased, to put the said sum of money into real estate above referred to, said Thomas P. Tracy agreed to and did deliver to your orator said insurance policy as indemnity against loss to your oratrix for the advance of said money, and then and there in the presence of witnesses delivered to your oratrix his said insurance policy, as and for her own, to keep and to have and to hold the same in lieu of said money so advanced by your oratrix as aforesaid, with the understanding and agreement that when he should die the said policy and the money thereby secured was to become the property of your oratrix and her heirs, in consideration of the said sum of \$1,500 so to him advanced on said real estate bought in his name as aforesaid."

The claim of appellee is based upon the following allegation in her bill of complaint:

"Your oratrix charges the fact to be that she is in equity the assignee of said certificate for value, and that she is the equitable owner of said certificate, by reason of said assignment to her for value, as above stated, and that it is not, nor was not, within the power of said Thomas P. Tracy, or said Royal Arcanum, or its officers, to cancel such certificate, in manner as above set forth, and that the issuance of

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any other certificate to other beneficiaries, in lieu of the one above described, under the circumstances above set forth, is void and is fraudulent, as against the right of your oratrix, and that the same, if any, was made without the knowledge or consent of your oratrix, and that the said new certificate is and should be declared void accordingly."

The prayer of the bill is, that the new benefit certificate issued to Annie Tracy, Elizabeth Tracy and Agnes Tracy, the daughters of Thomas P. Tracy, "be declared void, and that the attempt to cancel the certificate, No. 65,078, of September 8, 1885, above referred to, be declared void and of no effect, and that your oratrix may be declared to be the legal and equitable owner of the money secured by said certificate, No. 65,078, by reason of an equitable interest therein in favor of the complainant, and that the said Royal Arcanum may be decreed to pay the same over to your oratrix by a short day, or that the money collectible of the Royal Arcanum, on the death of said Thomas P. Tracy, as indemnity on his life, be paid over to your oratrix, as the equitable owner thereof."

The original bill sought, also, to have the devise of the real estate above referred to, to Thomas P. Tracy's children, set aside, but a demurrer to this portion of the bill was sustained by the court.

A decree as to the benefit certificate, in accordance with the prayer of the bill, was rendered, from which this appeal is prosecuted.

H. H. C. MILLER, attorney for the Supreme Council of the Royal Arcanum, appellant.

HARRY A. SULLIVAN, attorney for Annie, Elizabeth and Agnes Tracy, appellants.

A benefit certificate subject by the laws of the order to change at will, on the compliance with certain formalities and the surrender of the old certificate, may be changed in the prescribed way, although it has been delivered to a third party who pays the assessments. Bacon on Benefit Societies, Sec. 307; Fisk v. Aid Union Pa., 11 Atl. Rep. 84; Nib-

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lack on Benefit Societies, p. 405; Masonic Ass'n v. Bunch, 109 Mo. 560; Sabin v. Phinney, 134 N. Y. 423.

The fact that a member applying for a change of beneficiary by affidavit, or otherwise, does not state truly the reason why he does not produce and surrender the original certificate, is a matter of no concern to the old beneficiary, for the simple reason that such beneficiary has no vested interest in the benefit.

The requirement that the member shall account for the non-production of the certificate is made for the benefit of the order, and may be waived by it. All that is required in the case of the Royal Arcanum is that the member shall make "an affidavit of the facts in the case satisfactory to the supreme secretary, and pay a fee of fifty cents." Splawn v. Chew, 60 Texas, 532; Bacon on Benefit Societies, Vol. 1, p. 627 (Sec. 310a); Grand Lodge A. O. U. W. v. Child, 31 N. W. Rep. p. 1, Sec. 8.

" MEEK, MEEK & COCHRANE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question presented by the record of this cause is not whether the insured surrendered his first certificate and obtained a new certificate in accordance with the rules and regulations of the Royal Arcanum, but, who is entitled to the benefit of the insurance effected by Thomas Tracy.

While such a certificate, that is, insurance, is not assignable at law, it is in equity. Equitable rights thereto may be acquired, which a court of chancery will enforce. Bisham's Principles of Equity, Ch. VIII, 162, 167, 168.

Mrs. Tracy was, for a valuable consideration, the beneficiary named in, and the actual holder of Mr. Tracy's insurance certificate. For a large sum by her paid, the certificate was given to her; she kept it, and paid the dues subsequently accruing thereon. As between Thomas Tracy and his wife, he then had no right to attempt to surrender this certificate and obtain another payable to his daugh-

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ters. What he attempted, looking to such end, was not only based upon his false affirmation as to loss of the certificate, but was an attempt to fraudulently deprive his wife of what she equitably owned.

What her rights would have been against a person to whom another certificate had been, in good faith, for value, issued, or against the company, had it, without notice of her claim, paid to the beneficiaries named in the second certificate, the insurance money, it is unnecessary to consider. No such question is here presented.

It is manifest that had she been informed that her husband was about to surrender his certificate and have another issued to new beneficiaries, she might have applied to a court of equity to restrain such contemplated surrender and issue. High on Injunctions, Sec. 1113.

She is here a holder for value contending against mere volunteers, whose claim came into existence through the fraudulent conduct and misrepresentation of their donor.

As to such, it was not necessary that the holder of the fund, in whose hands it yet is, and who knew that the certificate made for her benefit was outstanding, should have been notified of the assignment to, and payments by, her, and as against such volunteers her right is clear. Bisham's Equity, 168; Commonwealth v. Crompton, 137 Penn. 138; Mt. Holly Lumber Co. et al. v. Ferree, 17 N. J. Eq. 117; Pomeroy's Eq. Jur., Sec. 1283.

The decree of the Superior Court is affirmed.

Swift & Company v. Vincentz Rutkowski, etc.

1. MASTER AND SERVANT.—*Employment of incompetent servants—Proximate cause.*—If a master knowingly employs an incompetent servant, who, by reason of such incompetency injures another, the cause of the injury is the employment of the incompetent servant.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding.

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67	339
67	209
167	156
67	209
82	109
82	462
67	209
97	368

Heard in this court at the October term, 1896. Affirmed. Opinion filed November 19, 1896.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

E. S. CUMMINGS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action for negligence. Appellee, a minor, while working for appellant, was seriously injured.

The plaintiff recovered a judgment for \$5,000.

Upon the trial the court, at the instance of the plaintiff, instructed the jury as follows:

"No. 1. The court instructs the jury that it is necessary that it appear from the evidence that the plaintiff was in the exercise of ordinary care, before he can recover; but what is ordinary care, is a question for the jury to determine from all the facts and circumstances in evidence in the case. If you believe from the evidence that the plaintiff was a minor of the age of fourteen years, or thereabouts, at the time he was injured, you have the right to take that fact into consideration in determining whether or not he was exercising ordinary care. The law required of him such care only as could and would reasonably be expected from a person of his age, knowledge and experience, under all the circumstances of the case; that is, the degree of care which he was required to exercise was ordinary care, in view of his age, knowledge and experience, and all the other facts and circumstances appearing from the evidence."

Ordinary care is such care as an ordinarily prudent adult person usually exercises.

The definition as applied to a particular instance, means such care as an ordinarily prudent adult person would be likely to exercise under like circumstances.

There is no such thing as the ordinary care of an infant. An infant is required to exercise such care as is to be expected from one of his age, intelligence and experience.

The foregoing instruction, while not such as to warrant a

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reversal of the judgment, was not a correct statement of the law.

“No. 2. The court instructs the jury that it was the duty of the defendant to exercise reasonable care and diligence to employ a sufficient number of servants in and about the work in which the plaintiff was engaged, to render the performance of the work by the plaintiff reasonably safe. And if the jury believe from the evidence that the defendant failed to exercise such reasonable care and diligence, and negligently failed to employ a sufficient number of workmen so as to render the performance of the work by the plaintiff reasonably safe, and that by reason of its negligence, if any, in that respect, the plaintiff was injured, and that before and at the time of the injury he was exercising reasonable care and caution for his safety, as charged in the declaration, your verdict should be for the plaintiff.”

There was no evidence warranting this instruction. The record does not show that the injury to the plaintiff was caused by a failure of the defendant to employ a sufficient number of men, but that the proximate cause of the accident was the swinging against the plaintiff of the carcass of a slaughtered animal. In an action for negligence, it is the proximate cause upon which the suit must be based. The proximate cause of an event is that cause which, in natural and continuous sequence, without the interference of an efficient, independent, intervening cause, produces the result. A cause may be proximate, although the first of a series of acts resulting in an injury, if each of the subsequent acts be a natural and probable result of the first; illustrated by the famous *Squibb* case, 16 Am. & Eng. Ency. of Law, 436; Webb's *Pollock on Torts*, 29-42.

The evidence in this case was not sufficient to warrant a verdict upon the counts charging negligence in failing to employ a sufficient number of men.

It will be well for counsel for appellee, upon another trial, to refrain from asking the jury to find the defendant guilty, because of alleged misconduct not charged in the declaration.

The judgment of the Superior Court is reversed and remanded.

MR. JUSTICE SHEPARD dissents.

MR. JUSTICE GARY.

I am not prepared to assent to, or dissent from, what Judge Waterman writes as to proximate cause. I do not feel quite certain whether it may be properly held, that if by reason of having too much work upon his hands, the appellee was in a place where he would not have been if he had had sufficient help, and thereby came in the way of the swinging beef, that in such case, the want of help may be said to be the cause of his injury. If the railway locomotive set a station house on fire, and the station house set a tavern on fire, it is the locomotive that burns the tavern. *Chi. & Alt. R. R. v. Pennell*, 110 Ill. 435.

If a master knowingly employs an incompetent servant, who, by reason of such incompetency injures another, the cause of the injury is the employment of the incompetent servant. *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100.

And the old *Squibb* case—which I won't stop to look up and cite—is a famous one on proximate cause.

But the second instruction was wrong for another reason. Consistently with the theory of that instruction, the appellee may have been as fully conscious, not only that he ought to have help, but of all the possible consequences of the want of it, as could a man of forty years of age have been. The instruction ignores the principle that a servant takes upon himself known risks.

I concurred in reversing the judgment without having had my attention called to the twelfth instruction requested by the appellant, which was as follows:

“No. 12. The court instructs the jury that, although Rutkowski was injured while at work for the defendant in the manner alleged in the declaration, that of itself is not sufficient to charge Swift & Co. with liability for his in-

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jury. Before Swift & Co. can be charged with liability in that regard, two things must be established by the evidence:

First. That Swift & Co. were guilty of negligence as charged in the declaration; and,

Second. That Rutkowski was, at and just before the time of the injury, exercising due care for his own safety."

That instruction, very slightly modified, was given to the jury. If it had been refused, the principle the court acts upon would have been just as applicable, that principle being that a party can not complain in this court that the court below went upon a theory which that party had "encouraged" the court to entertain. *McMahon v. Sankey*, 35 Ill. App. 341; *Hafner v. Herron*, 60 Ill. App. 592.

That the instruction given for the appellee was affirmative, and that asked by the appellant was negative, that the latter was totally disconnected from the former, and was one of a series, in others of which series the doctrine that an employe takes the risks of known dangers of his employment, was clearly stated—do not affect the ground of the principle, which is, that by the act of the appellant the court was put off its guard as to the particular feature in the similar instructions. "Reasonable," as the qualifying adjective of "care" in the instruction given for the appellee, is synonymous with "ordinary." 16 Am. & Eng. Ency., 398, note; 19 Ib. 1078.

It is not now open to the appellant to say that the second instruction for the appellee was error. It is probably the fact, at least the jury were warranted by the evidence in finding it to be the fact, that had the work at which the appellee was employed been more expeditiously done, as it would have been, had more hands worked at it, the appellee would not have been in the way of the swinging beef. Within the doctrine of many cases the lack of hands was the cause of the injury to the appellee.

I therefore concur with Judge Shepard in holding that the judgment is to be affirmed.

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169s 228

**A. B. Lawther and F. O. Swannell v. Margaret V.
Thornton et al.**

1. **NEGOTIABLE INSTRUMENTS—*Authority of Agent in Possession to Receive Payment of.***—An agent intrusted with, and in possession of, a negotiable or other instrument, is deemed by the fact of such possession to be authorized to receive payment of the instrument in accordance with its terms, when and after it becomes due, and not otherwise.

2. **MASTER IN CHANCERY—*When Findings Conclusive.***—When the testimony before a master consists very largely of the oral statements of witnesses, made in his presence, his findings are not to be set aside unless it is clear he was mistaken and has come to an erroneous conclusion upon the facts.

3. **AGENCY—*Subsequently Discovered Facts will not Justify a Presumption of the Existence of.***—A person who has dealt with the supposed agent of a third party, who, in fact, had no authority, can not be heard to say that transactions of which he was not aware when he assumed the existence of such authority, justified him in such assumption.

4. **MORTGAGE—*Satisfaction of, Not Always Conclusive.***—Where an agent has, in advance of its maturity, collected a note payable to his principal, and has satisfied a mortgage made to himself as trustee, to secure the payment of such note, a person knowing these facts and seeking to acquire an interest in the property covered by such mortgage, may not rely upon such satisfaction, but is bound to inquire whether the agent was authorized to receive payment of the note and to release the security.

Bill, to foreclose mortgage. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed November 19, 1896.

STATEMENT OF THE CASE.

On or before March 1, 1888, Margaret V. and Catherine V. Waite, of Chicago, applied to Charles W. Griggs, who was an attorney-at-law, engaged in the practice of his profession in Chicago, to procure a loan of \$3,000. Griggs at that time had a client by the name of Lawther, living in Syracuse, N. Y., for whom he had loaned considerable money. He therefore arranged to make the loan to the Waites, for Lawther. Margaret V. and Catharine V. Waite

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thereupon executed and delivered a promissory note, dated March 1, 1888, for \$3,000, payable to A. B. Lawther, at the Merchants National Bank at Chicago, March 1, 1893, with six per cent interest, payable semi-annually, and ten interest coupon notes for ninety dollars each, evidencing said interest. Margaret V. Waite, who at that time was unmarried, held the title to the property described and involved in this suit, and to secure the principal note and interest mentioned, conveyed the premises by trust deed to Charles W. Griggs, trustee, and F. O. Swannell, successor in trust.

These papers were retained in Chicago, in a safety vault, to which Griggs had access, and as the installments of interest became due, they were paid to Griggs, who canceled and surrendered the coupons and accounted for the interest to Lawther.

Subsequent to the execution of these papers Margaret V. Waite conveyed the premises to her sister, Lucy C. Waite, who assumed and agreed to pay the indebtedness.

Prior to the maturity of this indebtedness the Waites, desiring to procure a loan of \$10,000 on this property from the North Western Mutual Life Insurance Company, on December 20, 1892, paid to Griggs the sum of \$3,077. Griggs produced the securities, the note bearing upon its back the name of A. B. Lawther, canceled the original note, the last coupon and the trust deed, executed a release and surrendered the papers to the Waites, who thereupon procured a \$10,000 loan from the insurance company; the bond and mortgage for the same being executed by Lucy C. Waite, Catherine V. Waite and Charles B. Waite, the husband of Catherine. The indorsement "A. B. Lawther," on the back of the \$3,000 note and coupon was a forgery.

At the maturity of the \$3,000 loan, Griggs accounted to Lawther for the last installment of interest, and reported to Lawther that the principal of the loan had been extended for three years. Griggs died in April, 1894, and immediately following his death Lawther discovered the execution of the release and that the papers were gone. He thereupon filed his bill to foreclose the trust deed given to secure

the \$3,000 loan, alleging that Griggs had no authority whatever to receive payment of the indebtedness before its maturity, nor to execute a release of the trust deed and surrender the papers; that no part of the principal of the indebtedness, and no part of the interest, subsequent to the maturity, had ever been paid or accounted for to him; and praying that the release deed be set aside as a cloud upon the title to said premises; that the trust deed to Griggs be declared to be a first and valid lien upon the premises; that an accounting be had between the parties, and that the defendants, the Waites, be decreed to pay him whatever was found to be due him by the court, and that in default of such payment the premises be sold, etc.

The appellees, the Waites, answered alleging payment to Griggs on or about December 20, 1892; that the papers were canceled and surrendered to them and the release executed and delivered; that Griggs was the general agent of Lawther and had full power and authority to receive payment of the indebtedness and to cancel and surrender the papers and execute a release at any time; that the indebtedness has been fully paid and the trust deed released and discharged.

The North Western Mutual Life Insurance Company answered alleging that it did not know whether the indebtedness had been paid to Griggs or not, but that when applied to for a loan, it had ascertained of the existence of this trust deed, and required the trust deed to be released before it would make the loan of \$10,000. That subsequently Charles B. Waite delivered to it the canceled note and coupons and trust deed, as they appear in evidence, and the release deed, executed by the trustee; that relying upon these records they made the \$10,000 loan, and took the mortgage introduced in evidence as security, and it insists that whether or not the indebtedness has been paid to Lawther, the release deed executed by Griggs was effectual to clear the title and give the insurance company a first lien upon the premises.

The case was referred to a master to take proofs and report the same with his conclusions thereon.

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The master found and reported to the court that Griggs had no authority, either actual or apparent, to collect the indebtedness before its maturity, and cancel and surrender the papers and release the trust deed, and that as to the appellees, the Waites, the payment made by them to Griggs was unauthorized and made to one who had no authority to receive it, and that between them and the appellant, Lawther, the Waites are still liable for the principal note and interest thereon, from the time of its maturity.

As to the appellee, the North Western Mutual Life Insurance Company, the master found that under the circumstances of this case the release deed executed by the trustee Griggs, was effectual to clear the title of the property so that the mortgage to the insurance company was a first lien for the amount of the loan made by it, and the trust deed to Griggs became a second lien for the amount of the indebtedness secured by it.

To this report appellants A. B. Lawther and F. O. Swannell, who was made a party complainant as successor in trust under the trust deed, filed objections to the findings of the master relating to the insurance company, in which objections it was assigned as error that the master found the release deed to be effectual to give the insurance company a first lien, and that he did not find the trust deed to Griggs was a first lien on the premises.

Appellees, the Waites, and by which we mean all of the defendants except the insurance company (although subsequent to the execution of the papers Margaret V. Waite has, by marriage, become Margaret W. Thornton, and Lucy C. Waite has, by marriage, become Lucy Waite Robinson) filed objections to the master's report, which objections by order of court stand as exceptions. Upon hearing of the exceptions before the court the Waites filed amended exceptions.

The court entered a decree in which the exceptions of appellants, so far as they relate to the insurance company, were overruled, and the master's report as to the insurance company approved and confirmed, and as to the Waites, the

court sustained the exceptions of said appellees consistent with the facts and conclusions found in the decree, and overruled all others.

The court further finds in the decree that Griggs was the general agent of Lawther in the business of loaning money in Chicago, and that the payment by the Waites to Griggs was a valid payment to Lawther, and the mortgage thereby paid and satisfied, and the indebtedness extinguished. It was adjudged and decreed that the bill be dismissed for want of equity, and that appellees have execution for cost by them expended.

MANN, HAYES & MILLER, attorneys for appellants.

Where a person, in a suit against him on a note by the payee, claims payment to an agent, having sufficient evidence of apparent authority to protect him, no facts and circumstances of which he had no knowledge at the time the payment was made, are competent to prove apparent authority, because he could not be deceived by what he did not know. *Crane v. Gruenwald*, 120 N. Y. 274.

The fact that an agent has made a loan for his principal, is named as the trustee, has collected the interest and retained the papers in his possession, is not sufficient evidence either of his actual or apparent authority to permit him to collect the principal of a note before its maturity. 2 *Parsons on Notes and Bills*, 213; *Story on Agency*, Sec. 98; *Smith v. Kidd*, 68 N. Y. 141; *Thompson v. Elliott*, 73 Ill. 221; *Padfield v. Green*, 85 Ill. 529; *Stiger v. Bent*, 111 Ill. 328; *Doubleday v. Kress*, 50 N. Y. 410; *Crane v. Gruenwald*, 120 N. Y. 274; *Am. & Eng. Enc. of Law*, Vol. 18, page 198.

The principle established by the authorities cited, is, that vesting an agent with authority to carry out the terms of a bond, note or contract, gives him no authority whatever to vary or change the terms of the instrument.

Evidence of authority to loan, to collect interest, etc., is no evidence of authority to collect principal, and no such inference can be drawn therefrom. *Rich v. Smith*, 60 *Howard's Practice*, 13; *Story on Agency*, Sec. 98; *Thomp-*

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son v. Elliott, 73 Ill. 221; Cooley v. Willard, 34 Ill. 68; Garrells v. Norton, 26 Ill. App. 433; Austin v. Thorp, 30 Iowa, 376; Stiger v. Bent, 111 Ill. 328.

MONROE & THORNTON, attorneys for appellees; C. B. WAITE, of counsel.

W. P. THORNTON, attorney for Margaret V. Thornton and Catharine V. Waite, appellees.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for The Northwestern Mutual Life Insurance Company, appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

An agent intrusted with, and in possession of a negotiable or other instrument, is deemed by the fact of such possession to be authorized to receive payment of the instrument in accordance with its terms, when and after it became due, and not before.

The Supreme Court of this State in Thompson v. Elliott, 73 Ill. 221, says: "And it is further laid down by the authorities, that an agent, intrusted to receive payment of a negotiable or other instrument, is ordinarily deemed entitled to receive it only when and after it becomes due, and not before it becomes due; but if there be a known usage of trade or course of business in a particular employment, or habit of dealing between the parties, extending the ordinary reach of the authority, that may well be held to give full validity to the act." Story on Agency, Sec, 98; Paley on Agency, by Lloyd, 290, 291.

The presumed authority of the agent in such case is to receive payment of the instrument when or after it is due, in accordance with its terms, and is not to receive in satisfaction thereof anything except what the instrument calls for. Padfield v. Green, 85 Ill. 529; Am. & Eng. Ency. of Law, Vol. 18, 198; Keohane v. Smith, 97 Ill. 156; Doubleday v. Kress, 50 N. Y. 410; Crane v. Gruenwald, 120 N. Y. 274.

It is urged by appellee that Griggs was the general agent

of appellant, and that therefore he is to be presumed to have had authority to do what he did, viz., receive upon a note of appellant, before it was due, an amount of money in satisfaction thereof not equal to what the note called for when due, and for such less sum to surrender said note to the makers thereof.

A general agent is one authorized to transact all business of a particular kind; or a general agency may be stated to be an authority to act in a certain character; and a special agent has an authority to do a particular act. Ewell's Evans on Agency, pp. 1 and 135.

The distinction drawn in Paley on Agency is, that the authority is general or special with reference to its subject, that is, according as it is confined to a single act, or is extended to all acts connected with a particular employment.

Story, in his work upon Agency, adopts the same distinction.

The question whether Griggs is to be termed a special or general agent, is not of so much consequence, as is what it was he was authorized to do. The master to whom this cause was submitted, found as a matter of fact, and as reported to the chancellor, that Griggs had no actual authority from Lawther, the owner of the note to collect it before it became due.

The testimony before the master consisted very largely of the oral statements of witnesses made in his presence; he alone of all who have judicially passed upon this case saw and heard the witnesses; he, therefore, was in a better position to determine the truth in respect to this matter, than was the chancellor or is this court. Under such circumstances the finding and report of the master is not to be set aside, either by the chancellor or this court, unless from a reading of the evidence upon which the master acted, it is clear he was mistaken and has come to an erroneous conclusion upon the facts. Daniel's Ch. Pr., 1299, note 5; Izard v. Bodine, 1 Stock. 9, N. J. Equity 309; Sinnickson v. Bruere, 9 N. J. 659; Howard v. Scott, 50 Vt. 48; Herrick v. Lynch, 49 Ill. App. 657; Williams v. Lindblom, Ill. Opinion Nov. 9, 1896.

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After a careful examination of the evidence, we are unable so to say, and we think that the conclusions of the master as to the facts should have been sustained by the chancellor, and must be by this court.

The evidence does not warrant the conclusion that in respect to loaning money and receiving payment therefor, Griggs was authorized to stand in the place of his principal; nor does the character and relation of the parties warrant such an inference.

Lawther, a man of means, desired to loan his money upon satisfactory real estate security; his interests lay in keeping his money well loaned out, and not in abating interest and receiving payment on obligations running to him, before they became due. It is well known that investors, as a rule, dislike to change securities; the longer any security has stood fulfilling the purpose for which it was made, without flaw discovered in, or attack made thereon, and with prompt payment of interest secured thereby, the stronger becomes the presumption that it is flawless. To abate interest and surrender such security before it becomes due, involves the trouble and risk of obtaining a new and equally valid pledge, and is, as we have before stated, a thing which, as a rule, investors are exceedingly loth to do.

It is urged that the conduct of appellant in respect to his dealings with Griggs was such that appellees had a right to presume that Griggs was authorized to receive payment of the note in question before it became due. It does not appear that appellees, the Waites, when they paid this note, were aware of any of the acts which, they now insist, raised such presumption. Where the fact of authority does not exist, one can not be heard to say that transactions of which he was not aware when he assumed the existence of such authority, justified him in such assumption. Moreover, in the present case, appellees, the Waites, did not, when they gave to Griggs in satisfaction of their note, before it became due, a less amount than the note called for, act upon any presumption induced by anything that appellant had done, that Griggs was authorized to so receive payment of said

note; on the contrary, it in this case by stipulation appears that Mr. Waite went to Grigg's office in December, 1892, and asked Griggs if Lawther was willing that this loan should be paid before maturity, and that Griggs said he would write to Lawther and ascertain. And that subsequently Griggs reported to Mr. Waite that he had ascertained from Lawther that Lawther was willing that the loan should be paid off before maturity.

Griggs did not write to Lawther as he said he would, and never did ascertain from his principal that he, Lawther, was willing the loan should be paid off before maturity. In respect to this, Griggs told to Mr. Waite a falsehood, and appellees relied upon an untruthful statement by Griggs; for their assurance that Lawther was willing that they should pay off their note before it became due, they had merely the misrepresentation of Griggs. The application to, and representation by Griggs, they have pleaded in their answer and stipulated in the record, an application and a representation upon which they relied, and which appellant was in no way responsible for. With reference to this, the remarks of the court in *Doubleday v. Kress*, 50 N. Y., page 410, as well as those in *Crane v. Gruenwald*, 120 N. Y. 274, are applicable. From this application by Waite and representation by Griggs, it appears that Griggs himself considered that he had not authority to receive payment upon this note before its maturity. He made no pretense of having any such authority—recognized the necessity of special directions in this regard, which special authority he afterward falsely assured appellees he had obtained.

Appellees urge that Griggs received money on loans before maturity, at his own discretion. In support of this they call attention to the testimony of Mr. Lawther. "From my own investigation and investigations of others, I believe that Griggs did collect money before maturity. I acquired that knowledge since his death."

It is too patent for discussion that Mr. Lawther was not, is not, and, in the nature of things, could not be, an expert as to what Griggs did in the collection of money upon loans

made by appellant, and that the belief of the witness in the premises is of no consequence.

As to the representation of Griggs upon behalf of Lawther, of payment of sums before maturity or the ratification by Lawther of any such action, the master reports that it appeared that in only two instances had Griggs received payments of sums before maturity, and that one of these was received only one day before maturity, and that the day of its regular maturity was Sunday, and the master further reports as follows: "Suffice it to say that I do not believe that upon the whole record there is sufficient proof of facts from which a general authority in Griggs to collect before maturity, can reasonably be inferred."

The note made by appellees, the Waites, payable to the order of appellant, was due March 3, 1893, and, according to its terms, upon that date it called for \$3,090. This note was, by appellant, placed in the hands of Griggs, it must be presumed, that its terms might be carried out. It will hardly be claimed that, without express authority, Griggs, from the mere possession of the note, was authorized to receive payment of it in any other way than in accordance with its terms; yet, on December 20, 1892, he assumed to receive, in satisfaction thereof, the sum of \$3,077. Appellees, in paying this amount to Griggs, well knew that they did not pay as they, by the terms of their note, had undertaken; that a reduction from what the note called for was made to them. They assumed that what Griggs said in respect to his authority concerning this note was true; it turns out that it was false.

We have been referred to no authority, and we are not aware of any, holding that from the mere possession of a promissory note, an agent may be presumed to be authorized to abate anything therefrom. Even in the case of *Emery v. Gordon*, 33 N. J. Eq. 447, to which we have been referred, the remarks of the chancellor, which we do not think are in accordance with the decisions of the Supreme Court of this State, do not go to the extent of sustaining the position now insisted upon by the makers of this note.

It is also urged by appellees, the makers of this note, that, although Margaret V. Waite borrowed this money from the appellant, Lawther, and gave to him her promissory note therefor, as a principal, yet, afterward, as between Lawther and Margaret V. Waite, now Mrs. Thornton, she became and was a mere surety, by virtue of her having sold and conveyed the land to Lucy C. Waite, now Mrs. Robinson, which she mortgaged to secure the note she gave for the money she borrowed from appellant.

We do not think that by such conveyance and the undertaking by Lucy C. Waite to pay the debt of Margaret, Margaret, as regards her relation to appellant, became a mere surety; nor does it appear that appellant has done anything by which his rights against Margaret, the primary and principal debtor to him, have been lost or prejudiced. As to this, the case of *Fish v. Glover*, 154 Ill. 83, is instructive.

The master found, as a matter of law, that, as a consequence of the execution by the trustee of a release of the mortgage made by the Waites, such mortgage must be regarded as now secondary to the incumbrance which was given to the insurance company to secure a loan made by it upon the strength of such release and record. It appears by the testimony of Mr. Prindiville, the agent of the insurance company, who made the loan for it, he was aware that appellant's mortgage had been made and placed upon record. The mortgage of the insurance company was recorded December 16, 1892. The release of appellant's mortgage, executed by Griggs, bears date December 20, 1892. Mr. Prindiville further testifies: "The money on the loan" (meaning the loan made by the insurance company), "was paid subsequent to December 16, 1892, when the release of the former incumbrance and the canceled trust deed and notes were in my possession."

Across the face of the \$3,000 note, payable by appellees, the Waites, to Lawther, when it was, before the making of this loan, delivered to the insurance company, was written: "Paid December 20, 1892. A. B. Lawther, per C. W. Griggs."

Rand, McNally & Co. v. Francis.

Across the face of the trust deed securing said note, were written these words: "Indebtedness paid and released, this 20th December, 1892. Charles W. Griggs, trustee."

The insurance company was thus, before it made its loan, informed by its possession of appellant's note, that the same was not due until March 3, 1893, and that Griggs had assumed to receive payment thereof December 20, 1892. It was therefore incumbent upon the insurance company to ascertain whether Griggs was authorized to receive payment of this note, and to release the security therefor given, three months before it became due. The insurance company thus knew that when it made its loan, the note given to appellant and the mortgage securing the same had then nearly three months to run. The insurance company, without inquiry, assumed that Griggs was authorized to do what he had done; it now appears that he was not so authorized. We are therefore of the opinion, in accordance with the holding of the Supreme Court in *Keohane v. Smith*, 97 Ill. 156, that the incumbrance of the insurance company is subordinate to the claim of appellant.

Our finding in this regard is not in opposition to any conclusion or finding of fact by the master; it is merely a dissent from his conclusion as to a matter of law.

The judgment of the Superior Court is reversed, and the cause remanded to that court with directions to add to the sum found by the master to be due upon appellant's note the interest that has since accrued upon the principal thereof, and award to him a decree for the foreclosure of his mortgage, not inconsistent with this opinion.

Rand, McNally & Company, a Corporation, etc., v. Joseph H. Francis, Assignee, etc.

1. VOLUNTARY ASSIGNMENTS—*Distribution of Assets—Powers of Court and Assignee.*—Neither the court nor the assignee can create charges against an insolvent estate, other than expenses; they can only allow such as already exist by virtue of past transactions.

Voluntary Assignment.—Claim for rent. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

RALPH ROBER CROCKER, attorney for appellant.

EDWARD A. ROSENTHAL, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Appellant was the landlord, and the appellee is the assignee in insolvency, of one Leon Hornstein. After the assignment, the appellee continued to occupy the premises for nearly two months, and for the time of that occupation the rent has been paid.

Now the appellant claims that the whole rent which had accrued before the assignment, as well as all unpaid, which would accrue to the end of the term, should be allowed as a preferred debt against the assets of the insolvent.

The County Court allowed such rent, but only to be paid *pro rata* with other debts, and this appeal is from the refusal to give appellant priority.

The appellee seems to rely upon the effect of an order made by the County Court, September 27 or 28, 1895, that the appellant should release the levy of a distress warrant, and surrender the possession of the premises, as some sort of a bargain with the court, by which the estate of the insolvent became liable for the rent as an expense of administration.

Neither the court nor the assignee can create charges upon the assets—only allow such, other than expenses, as already exist by virtue of past transactions. *Hanford Oil Co. v. First Nat. Bk.*, 126 Ill. 584.

When a lease to an insolvent is accepted by the assignee, whatever liabilities for subsequent rent are thereby incurred, except rent during occupation for winding up of the estate of the insolvent, are personal liabilities of his own. He can not contract for future liabilities of the estate. *Johnson v. Lemon*, 30 Ill. App. 370, 131 Ill. 609; *Sperry v. Fanning*, 80 Ill. 371; *Chicago Fire Place Co. v. Tait*, 58 Ill. App. 293.

FIRST DISTRICT—OCTOBER TERM 1896

Congregation B'Nai Abraham et al. vs. [illegible]

With the propriety of the order of [illegible] have nothing to do.

If wrong, the other creditors are [illegible] by it.

The County Court followed the [illegible] Court in *Smith v. Goodman*. [illegible] appealed from is affirmed.

Congregation B'Nai Abraham et al. vs. [illegible]

1. PLEADING—*Effect of Allegations* [illegible] right of recovery for an injury is not [illegible] in a suit in which it is sought to recover [illegible] allegation of another cause of action [illegible] tain.

2. PRACTICE—*Objections to Judgment* [illegible]—The objection that a judgment against [illegible] tained by the evidence as to all of [illegible] time on appeal, and a statement [illegible] was no evidence to sustain a verdict [illegible] verdict was contrary to the evidence [illegible]

Trespass, for injury caused by [illegible] Court of Cook County; the Hon. [illegible] ing. Heard in this court at the [illegible] ion filed November 30, 1896.

A. J. REDMOND, attorney for [illegible]

The court erred in refusing [illegible] case made out was material [illegible] in the declaration. A person [illegible] recover on another. *Trust* [illegible] Ill. 204; *Chicago & A. R.* [illegible] 110.

WILLIAM E. O'NEILL, [illegible]

MR. PRESIDING JUSTICE
OF THE COURT.

This appeal is from
the appellee against: [illegible]

The declaration alleged that the defendant, with force and arms, broke and entered the plaintiff's close; "and did, with force and arms, * * * erect upon a portion of the premises described, a certain edifice commonly called a church, and did with force and arms place, or cause to be placed, upon the eaves of said edifice, a certain coping, which coping extends in and upon the premises and close of the said plaintiff, and by reason of the said trespass the said plaintiff has been greatly injured by the constant overflow of water and snow from said coping in and upon and against the aforesaid premises of the plaintiff," etc.

There was sufficient evidence tending to show an injury done to the plaintiff's premises from the precipitation there-upon of snow, ice and water, from the roof of the church, to justify the verdict of the jury, both in respect to the fact of injury and the amount of the recovery, if any recovery could be had, and we will not make further mention of that subject.

The allegation of the erection of the edifice upon a portion of the plaintiff's close was not sustained by the proof, but it was clearly established, and may, perhaps, be said to be no longer denied, that the coping upon several, if not all, of the pilasters upon the north side of the building, and perhaps the entire roof cornice upon that side of the building, extended over and overhung the premises of the plaintiff a varying distance of from three to six and one half inches at different points.

Such overhanging affording of itself a cause of action, the right of recovery for the resulting injury was not destroyed because there was joined to it an allegation of another cause of action which the evidence did not sustain.

It is urged that it was error to admit evidence tending to show that a wall extending from the front foundation wall of the church to the sidewalk line, but not reaching above the grade or level of the plat of ground in front of the church, rested in part upon the premises of plaintiff, because of there being no allegation in the declaration to support such proof.

Whether, or not, such a wall, which from the photographs in evidence appears to be a retaining wall, to hold in place the plat of ground upon which the broad and high steps to the church entrance rest, lying between the front of the church proper and the sidewalk, and which does not support, directly or indirectly, any part of the edifice except the front steps, may be said to be covered by the allegation that the church was erected upon a portion of plaintiff's premises, may not be altogether clear, and need not be decided.

It is quite plain that the appellants were not injured by the evidence in that regard. The evidence concerning it was slight and conflicting, and no injury resulting from it was attempted to be proved. Moreover, the instructions given in behalf of the appellants, (and none were offered or given in behalf of appellee,) eliminated all consideration of that subject by confining the jury's attention to the single element of injury arising from the overhanging by the coping, or cornice.

Another objection is made, because of the judgment being against the three individuals, Klausner, Peck and Simon, jointly with the appellant church corporation, or congregation. Such individuals were sued by their proper names, with the affix "trustees" following the names of them all. It was not alleged or proved what they were trustees of, and there was no attempt made to prove anything against them or either of them, either as trustees or as individuals. Had the point been made in the court below, and specifically assigned as error in this court, the judgment would have been erroneous. But neither the motion for a new trial in the Superior Court, nor the assignment of error here, specifically raised the objection, and it can not be taken advantage of, for the first time, by pointing it out in the briefs. The reasons in the motion for new trial, that there was no evidence to sustain a verdict against the defendants, mentioned in the declaration, and that the verdict was contrary to the evidence, constituted the nearest approach that was made to calling the attention of the trial court to the error

of the verdict being against all the defendants, but that was too general. The very error in regard to such a matter should have been specified, so that the trial court might then and there have relieved against it, by permitting a dismissal of the cause as to the said individual defendants.

The rule with reference to the specific pointing out of a variance is applicable. *City of Chicago v. Seben*, 62 Ill. App. 248; *Strodtman v. County of Menard*, 158 Ill. 155.

Upon the whole record the judgment must be affirmed.

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J. V. Northam & Co. v. John M. Atherton.

1. APPEALS—*From Interlocutory Orders—What Question Raised by.*—An appeal from an interlocutory order appointing a receiver does not raise the question whether other relief prayed by a bill should be granted.

2. CORPORATIONS—*A Creditor, Whose Debts are Not Due, May Have Receiver Appointed.*—A simple contract creditor may file a bill to dissolve a corporation and appoint a receiver to wind up its affairs under the provisions of Sec. 25 of Chap. 32 R. S., nor does it matter that none of his debts are due. Proceedings under this section are for the benefit of all the creditors *pro rata* of an insolvent corporation.

Bill, for receiver for and dissolution of corporation. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

COLIN C. H. FYFFE, attorney for appellant; ISHAM, LINCOLN & BEALE, of counsel.

A court of chancery is without jurisdiction to decree the dissolution of a corporation, except so far as that jurisdiction is conferred by statute. Such jurisdiction is derived alone from section 25, chapter 32, R. S., and not from the general equity powers of the court, sitting as a court of chancery. *People v. Weigley*, 155 Ill. 503; *High on Receivers*, Sec. 288; *Bangs v. McIntosh*, 23 Barb. 591.

The statutory authority, under which a receiver of a corporation is appointed and the company thereby divested of the control of its property and affairs, must be strictly pursued. In such cases, courts of equity will, in the language of the decisions and text-books "proceed with extreme caution." The power, where it exists, is distinctly an "extraordinary" power. High on Receivers, Secs. 290, 292; People v. Weigley, 155 Ill. 503; Bangs v. McIntosh, 23 Barb. 591; Oakley v. Peterson Bank, 1 Green's Ch. 173; Baker v. Adm'r of Backus, 32 Ill. 79.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

"The legal acceptation of a debt is a sum of money due by certain and express agreement." 3 Bl. Com. 154. It need not be presently payable or matured. Elkins v. Wolfe, 44 Ill. App. 376; Leggett v. Bank of Sing Sing, 24 N. Y. 283; U. S. v. State Bank of N. C., 6 Pet. 29; People v. Arguello, 37 Cal. 525.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant is a corporation of which the appellee is a creditor, but of the several debts which the corporation owed him, no part was due by the original terms of its creation, when the bill herein was filed, September 16, 1896. On that day the appellee entered judgment by confession upon a judgment note of the appellant, given as collateral for a loan of \$3,500 made August 10, 1896, on four months time. This bill is filed under Sec. 25, Ch. 32, Corporations. It charges that under an execution upon that judgment, and an execution upon another judgment of \$25,000, entered the same day, all the personal property of the appellant has been levied upon by the sheriff; that all the stock and fixtures of several retail stores of the appellant are in the possession of the holder of a chattel mortgage made by the appellant; that it had assigned all its book accounts and warehouse receipts; had discharged all its employes, directed its officers to make no more contracts or sales, and to do no more business in its behalf; and then

follows a formal averment that the appellant "did cease doing business, leaving debts unpaid."

The bill prays for a dissolution of the corporation, but whether that relief shall be granted, is not a question upon this appeal from an interlocutory order appointing a receiver. *Chicago Steel Works v. Illinois Steel Company*, 153 Ill. 9; *Buda Foundry Co. v. Columbian Celebration Co.*, 55 Ill. App. 381.

The facts alleged in this bill take the case out of the reason which governed *Brabrook Tailoring Co. v. Belding*, 40 Ill. App. 326. Here the appellant had, in effect, declared that it would do no more business, and it is apparent that it could not if it would.

Without regard to the judgment entered by the appellee September 15, 1896, he had the right, as a simple contract creditor, to file a bill under Sec. 25. *Buda Foundry Co. v. Columbian Celebration Co.*, 55 Ill. App. 381; *Butler Paper Co. v. Robbins*, 151 Ill. 588.

Nor does it matter that none of his debts were due. Proceedings under Sec. 25 are for the benefit of all the creditors, *pro rata*, of an insolvent corporation. *Curran v. Bradner*, 27 Ill. App. 582.

There is no equity in permitting creditors whose debts are due, to avail themselves of the various modes by which they might obtain, exclusively, the satisfaction which all are entitled to share in, and hold back the creditors whose debts are not due until all sources of relief are exhausted. Whatever may be the effect of the execution which the appellee has in the hands of the sheriff, he can not, by it, have any remedy for over \$2,000 more which the appellant owes him. If the latter sum were his whole debt, his right to relief upon it would be no better than it is now, when it is but the smaller part of the whole.

The order appointing a receiver is affirmed.

Lund v. Hennessey.

Emma Lund (formerly Emma Erland) v. John J. Hennessey.

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197	232

1. JUDICIAL OFFICER—*Not Liable for Erroneous Judicial Act within his Jurisdiction.*—No judicial person—whether a chancellor sitting in a court of equity, a judge of a common law court of record, a justice of the peace or other inferior magistrate, a member of a court martial or juror, who is a part of the court—is, for any judicial act within his jurisdiction, however erroneous or mistaken, answerable in a civil suit to a party aggrieved. The only distinction between judges of superior and inferior jurisdiction, is that in the case of the latter the jurisdiction must be made to appear.

Trespass, for false imprisonment. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

On May 21, 1893, Emma Lund, the appellant, formerly Emma Erland, was a captain in the Salvation Army. In that capacity she was leading a small band of fellow-workers along Wentworth avenue, near 54th street, for the purpose of bringing in converts. On May 22d she was arrested, at the instance of one Hartung, a physician, and co-defendant. Said Hartung made a complaint to J. J. Hennessey, justice of the peace and appellee. This complaint was as follows:

“State of Illinois,
County of Cook, } ss. The complaint and information
City of Chicago. } of C. J. Hartung, of Chicago, in said
county, made before J. J. Hennessey, esquire, one of the justices of the peace in and for said county, on the 21st day of May, 1893. Said complainant, being duly sworn, upon his oath says, that on or about, to wit, the day and year, and in the county aforesaid, Emma Erland, Hulda Duhlberg and John Karloon, did willfully and unlawfully disturb the peace and quiet of the neighborhood by loud and unusual noises, contrary to the forms of the statute in such case

made and provided. That this complainant has just and reasonable grounds to believe, and does believe, that the said Erland, Duhlberg and Karloon committed said offense, and therefore prays that they may be arrested and dealt with according to law.

CHRISTIAN J. HARTUNG, M. D.,
5304 So. Ashland Ave.

Subscribed and sworn to before me, this 21st day of May,
A. D. 1893.

J. J. HENNESSEY,
Justice of the Peace."

Upon this the following warrant was issued :

"State of Illinois, }
City of Chicago, } ss.
County of Cook. }

The People of the State of Illinois, to all sheriffs, coroners, constables and police officers within said State—greeting :

Whereas, complaint in writing, under oath, has been this day entered before the undersigned, a justice of the peace within and for said county, by C. J. Hartung, that on or about the 21st day of May, A. D. 1893, the offense of disturbing the peace was committed.

That said offense was committed in said county and State, contrary to the form of the statute in such case made and provided, and that said complainant has just and reasonable grounds to believe that Emma Erland committed said offense of disturbing the peace.

We therefore hereby command you forthwith to arrest the said Emma Erland and bring her before me, at my office in the Eighth District police court room in said city, or in case of my absence or inability to act, before any other judge or justice of the peace of said county, to answer to the people of the State of Illinois, on said charge, and abide such further orders as may be made concerning said charge, and make due service and return hereof, as the law directs.

Given under my hand and seal, at my said office, this 21st day of May, 1893.

J. J. HENNESSEY, [SEAL.]
Justice of the Peace."

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Under this warrant appellant was arrested on Monday morning and imprisoned until Tuesday morning, when a continuance was granted the people. On Wednesday, at 2 o'clock, the prisoner, together with four other Salvation Army soldiers imprisoned for the same cause, was taken before Judge M. F. Tuley of the Circuit Court of Cook County, on habeas corpus proceedings, and by him discharged. An action in trespass for false imprisonment was brought by her against both Hartung and the justice of the peace.

As to the defendant, Hennessey, the court instructed the jury to bring in a verdict in his favor, which the jury did, making no mention of Hartung.

Appellant prayed for and was allowed an appeal from the judgment entered by the court for appellee.

POPE & SMALL, attorneys for appellant.

MASTERSON & HAFT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

No judicial person, whether a chancellor sitting in a court of equity, a judge of a common law court of record, a justice of the peace, or other inferior magistrate, member of a court martial, or juror, who is a part of the court, is, for any judicial act within his jurisdiction, however erroneous or mistaken, answerable in a civil suit to a party aggrieved. Bishop on Non-Contract Law, Secs. 771, 781; Cooley on Torts, Second Ed., 472; Webb's Pollock on Torts, 138-327; Am. Ed. of Addison on Torts, Sec. 883; Am. & Eng. Ency. of Law, Vol. 12, p. 33.

The only distinction in this respect between judges of courts of superior and inferior jurisdiction is that, in the case of the latter, the jurisdiction must be made to appear. In the present case it appears that the justice of the peace had jurisdiction over the subject-matter, and also as to the person concerning whom he acted. Appellee is, therefore, not liable for a mistake, if any there was, in the form of the warrant issued by him.

The judgment of the Superior Court is affirmed.

GARY, J.

We ought not to go into the merits of this case.

The abstract shows that the appellant proceeded below upon the arrest as the trespass complained of (with the previous interview in the street, Hennessey had no connection), and the appellant could not pursue two jointly for a separate trespass by one.

The abstract does not show who made the complaint, nor who issued the warrant that was put in evidence, and therefore does not show that either of the defendants below had any connection with the arrest. The fact that the appellant was taken before Hennessey is no proof that he issued the warrant, as that may have been done under Sec. 349, Ch. 3, Div. 7, of the Criminal Code; Ch. 38 Hurd R. S., 1895. Sec. 164, Ch. 79, same edition, does not give a justice exclusive jurisdiction of the offense charged. *Hankins v. People*, 106 Ill. 628; *Kennedy v. People*, 122 Ill. 649.

We are under no duty to look beyond the abstract for the facts of a case. *Chapman v. Chapman*, 129 Ill. 386; *Chicago, Peoria & St. Louis Ry. v. Wolf*, 137 Ill. 360.

The verdict disposing of the case as to Hennessey, without mention of Hartung, was an end of the case as to him. *Wilderman v. Sandusky*, 15 Ill. 59.

The principle of that case is not affected by which way the verdict may be as to the defendant named in it.

Charles F. Swan and Clark P. Wilder v. James H. Gilbert.

1. EVIDENCE—*Statement by Managing Partner that Firm is Insolvent Not Objectionable as Conclusion.*—The testimony of an active managing partner of a mercantile business, familiar with its affairs, that the firm is either solvent or insolvent, is not subject to objection as the statement of a conclusion.

2. SHERIFF—*Need Not go Behind Process.*—It is not the duty of a sheriff to examine the files of a cause in which an execution issues, to ascertain whether such execution, which is against one of the partners of a firm, is for a firm or an individual indebtedness.

Swan v. Gilbert.

3. EXECUTION—*To What Extent Plaintiff May Control.*—While a sheriff should obey all proper instructions given him by the plaintiff in an execution, it is not his duty, upon an execution against one party, to levy upon the property of another, nor to apply firm property to the satisfaction of an execution against one of the partners although the plaintiff may direct him so to do.

4. PARTNERSHIP—*Rights of a Judgment Creditor of One Member of a Firm.*—A partner's interest in firm property may be sold under an execution against him only, but the purchaser takes the property precisely as it was held by the defendant in the execution, subject to the rights of the partnership creditors and the other partners. The sheriff can only levy upon the partner's interest in the whole stock, and a purchaser only acquires the interest of such defendant in such firm property as may remain after the partnership debts are paid and the accounts between the partners adjusted.

Trespass on the Case, for a false return. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed November 30, 1896.

STATEMENT OF THE CASE.

In 1892 the plaintiffs were copartners in the banking business in South Chicago. Prior to June 5th of that year, W. A. Cave, and Charles Cave were in the dry goods business, under the firm name of Cave Brothers. They had become indebted to the plaintiffs in the sum of \$1,000 for money loaned them by plaintiffs, evidenced by the note of W. A. Cave, indorsed by his brother.

About March 1st of that year the copartnership of Cave Brothers was dissolved, and W. A. Cave and Frank G. Mathison entered into a copartnership in business as dealers in general merchandise at South Chicago.

The new firm, as part consideration of its formation, assumed the above note, and on June 5th substituted the judgment note of the firm for the principal of \$1,000, after paying the interest on the old note to that date.

This note was signed in the firm name of "W. A. Cave & Co.," the signature being attached thereto by W. A. Cave in the regular course of partnership business, and with the knowledge and consent of Mathison.

About March 1st, the new firm purchased the stock of Edward L. Hassenstein, who was then in the dry goods business, paying partly therefor in cash, the balance in notes, the last of which, for \$500, being a judgment note, due August 1, 1892.

The firm conducted two stores, one at No. 9206 Commercial avenue, known as the Bee Hive, under the name and style of W. A. Cave & Co., the other at Nos. 245 and 247 92d street, under the name of F. G. Mathison & Co., and known as the Fair. No others were interested in the business conducted at either place.

On the sixth day of August, 1892, W. A. Cave executed two chattel mortgages to secure an indebtedness from the firm to Marshall Field & Co., one securing the sum of \$4,592.89, signed, "F. G. Mathison & Co.," the firm signature being attached by W. A. Cave, and covering the stock at Nos. 245 and 247, 92d street. The other to secure an indebtedness of \$4,177.49, signed, "W. A. Cave & Co.," the firm signature being attached by Cave, and covering the stock in the store on Commercial avenue.

On the evening of said 5th of August, Charles J. Jones, then a deputy sheriff under the defendant, took possession of the respective stores and stocks under the above mortgages, as the agent for Marshall Field & Co., and also took possession of \$72 in currency, then in the cash drawers of the stores.

On the 8th of August, 1892, F. G. Mathison executed two chattel mortgages on behalf of the firm, to secure an indebtedness to the Calumet National Bank of \$3,000 each, one in the name of "W. A. Cave & Co.," on the stock in the Commercial avenue store, the other on the stock of the 92d street store, in the name of "F. G. Mathison & Co."

These mortgages were recorded at eight o'clock and thirty minutes, A. M., on that day.

Also, on the 8th of August, 1892, F. G. Mathison, on behalf of the copartnership, executed a chattel mortgage to Ella Orb, to secure an indebtedness of \$825 on the stock in the Ninety-second street store, and at ten o'clock on that

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day, said Ella Orb placed the same in the hands of said Jones for foreclosure. In the afternoon the Calumet National Bank mortgages were placed in the hands of Jones for foreclosure.

On the 8th day of August, 1892, judgment by confession was entered in favor of the plaintiffs herein upon the judgment note of \$1,000, executed in the name of "W. A. Cave & Co.," as above stated. The names of the individual members of the firm not appearing as makers, judgment was rendered against said "W. A. Cave," and execution was immediately issued upon this judgment.

Upon the same day judgment was entered in the Superior Court in favor of Edward L. Hassenstein on the judgment note signed by the firm, and given to Hassenstein on purchase of stock March 1, 1892.

The names of the copartners not appearing as the makers of this note, judgment was entered against "F. G. Mathison;" execution was immediately issued on said judgment, and at one o'clock and ten minutes of that day, the plaintiffs and Edward L. Hassenstein delivered their respective executions to the sheriff for collection, in accordance with the command of the writs, and a day or two afterward the sheriff was informed that the judgments were on partnership obligations.

Jones being in possession of the stocks, levied these executions as deputy sheriff, and advertised a sale under such levy; posted notices of sale, and shortly afterward tore down said notices. He also advertised the property for sale under the Marshall Field, Calumet National Bank, and Orb mortgages. Jones remained in sole possession of the property from the time he seized it under the Field mortgages on the 6th of August, until he finally sold it all on the 24th of the same month. The sale was advertised for the 22d of August, at ten o'clock A. M. At that time it was adjourned by Jones until the 24th of August, at the same hour. On the 22d, W. A. Cave executed two chattel mortgages on these stocks to the J. V. Farwell Company, one in the name of F. G. Mathison & Co., to secure an

alleged indebtedness of \$3,500 on the Ninety-second street stock; the other in the name of F. G. Mathison & Company on an alleged indebtedness of \$2,000, covering the Commercial avenue stock; and about four o'clock P. M., of the 22d of August, 1892, the Farwell Company placed these mortgages in the hands of Jones for foreclosure.

On the 24th of August, at the adjourned sale, the property was sold by Jones, he realizing from the two stocks the net sum of \$18,200 over and above all costs and expenses, which, with the sum of \$72 taken by him from the cash drawer, made the total net sum of \$18,272 in his hands. From this sum he paid the Marshall Field mortgages in full, one of the bank mortgages in full, and the other as far as receipts from the property covered by it would extend. He also paid the Orb mortgage in full, leaving in his hands the sum of \$2,240.78 net balance, including the \$72 so taken from the cash drawers and not covered by any mortgage. There was no foreclosure of the Farwell mortgages, nor was a sale under them advertised.

While this money remained in his possession, the plaintiffs in each of the judgments demanded that he satisfy the executions out of these moneys.

This he declined to do, alleging the judgments to be against the individual members of the firm; he was then informed that the plaintiffs' judgment by confession was upon partnership obligations, and he was referred to and requested to examine the files of court for further evidences of that fact. He refused to do so, and paid the money on the Farwell Company's mortgages against the protest of the plaintiffs, and returned the executions *nulla bona*.

The plaintiffs brought this action of case against the sheriff for a false return; Hassenstein brought a like action; the cases were tried together. Aside from the respective notes, judgments and executions, the facts are precisely the same in the respective cases.

Trial was had before the court without a jury; the finding was for the defendant, and plaintiffs appeal to this court.

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A. B. ST. JOHN, S. A. FRENCH, and D. W. C. MERRIAM, attorneys for appellants.

The execution is the process of the plaintiff, and he has a right to control it, and the officer is liable for disregarding the instruction of the plaintiff. *Morgan v. People*, 59 Ill. 58; *Alderson on Judicial Writs and Process*, Sec. 181; *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310.

The unsecured creditor of a copartnership has no lien, legal or equitable, on the partnership assets, and no right to have such assets first applied to the payment of his claim in preference to the like creditor of the individual partner; both classes of creditors stand on a strict equality as to the individual and partnership assets, without reference to the fact of partnership or no partnership. *Ladd v. Griswold*, 4 Gilm. 37; *Farwell v. Cook*, 42 Ill. App. 293; *Hapgood et al. v. Cornwell et al.*, 48 Ill. 64; *Singer & Nimmick v. Carpenter*, 125 Ill. 117; *Hanford v. Prouty et al.*, 133 Ill. 352; *Young et al. v. Clapp*, 147 Ill. 191; *Farwell et al. v. Huston*, 151 Ill. 239.

Although a partner has an equitable right to have the assets of the partnership marshaled and applied to the liquidation of partnership debts and obligations in preference to claims against individual members of the firm, he can part with, waive or abandon such right, and when he does so the equity of the creditor is at an end. *Ladd v. Griswold*, 4 Gilm. 38; *Singer et al. v. Carpenter*, 125 Ill. 120; see also the case of *Young et al. v. Clapp et al.*, 147 Ill. 191, where the court holds as follows:

“The equity of the creditor is of a dependent and subordinate character and is to be worked out and enforced through the medium of the equities of the partners. The partner may part with his right to have the firm property applied to the payment of the partnership liabilities; when he does so the equity of the creditor is at an end.”

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

A sheriff can not levy upon any specific article of partnership property, and segregate that as the property of the

defendant partner, but must levy upon the partner's interest in the whole stock. The only interest he has in the property is in the surplus after the partnership debts are paid, and the accounts between the partners have been adjusted. Murfree on Sheriffs, Sec. 545.

"The buyer at an execution sale can not acquire a better title than the debtor partner had, and therefore does not acquire an absolute title to the chattels sold, nor priority over partnership creditors, but his title is subject to the partnership debt and equities between partners. He becomes a claimant in common with the copartners for a share of the surplus. It follows that in case the partnership is insolvent, or the debtors' and copartners' equities absorb the debtors' share, the buyer of the interest gets nothing; hence the sheriff is not liable if he allow the effects to be applied to the payment of the partnership creditor, nor even if he release the levy in case of insolvency." Bates on Partnership, Secs. 1111, 1112; see also Chandler v. Lincoln, 52 Ill. 74.

The copartnerships being insolvent, Cave's individual interest was worthless; therefore there was nothing of value to levy on, and the plaintiffs could not have been injured by the failure to levy. Chandler v. Lincoln, 52 Ill. 74; Rainey v. Nance, 54 Ill. 29; Richards v. Allen, 117 Pa. St. 199 (11 Atlantic Rep. 552); Murfree on Sheriffs, Sec. 545; 2 Bates on Partnership, Secs. 1111 and 1112; Clements v. Jessup, 36 N. J. Eq. 569; Commercial Bank v. Wilkins, 9 Me. 28; Lyndon v. Gorham, 1 Gallison, 367; Rice v. Austin, 17 Mass. 197; Wilson v. Strobach, 59 Ala. 488; 1 Freeman on Executions, Sec. 199; State ex rel. Talbott v. Emmons, 99 Ind. 452; Staats v. Bristow, 73 N. Y. 264.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon the trial of this cause, it appeared, without dispute, that the firm of W. A. Cave & Co. and F. G. Mathison & Co. was insolvent at the time the sheriff received the plaintiffs' respective executions.

It is objected that a member of the firm was permitted to

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testify that at such time the firm was insolvent, it being insisted that he should have been asked as to the assets and liabilities of the firm, that therefrom a conclusion as to its insolvency might be deduced.

We think that an active, managing partner of a mercantile business, familiar with its affairs, is to be considered a competent witness to testify regarding its insolvency, and that he may, upon direct examination, testify that the firm is either solvent or insolvent, leaving to the other side, if dissatisfied with such evidence, an opportunity to examine him as to the assets and liabilities of such firm, and the knowledge he has from which he makes his statement. Moreover, the undisputed facts brought out upon the trial, show beyond question that the firm was insolvent, as the witness testified.

Appellants claim that the sheriff, in refusing to consider their executions as being liens having precedence over the Farwell mortgages, assumed to act judicially; that he should, as requested by appellants, have examined the files of the causes in which appellants' respective judgments were entered, and that therefrom he would have seen that while each judgment was against but one of the partners, it was obtained for a firm indebtedness.

It appears to us that it was the appellants who asked the sheriff to act judicially. The sheriff had in his hands two writs, each of which ran only against one partner. Under such writ he had authority to sell only the right, title and interest of the person against whom the respective executions ran, and had no right to take or sell the property or interest of any other person. It was not for the sheriff to examine the files of the respective causes in which such executions were issued. His duty and his right was merely to obey the command of the processes given to him. Upon the judgment and execution against W. A. Cave, the sheriff could levy upon and sell only the right, title and interest of W. A. Cave; and upon the other judgment and execution against F. G. Mathison, the sheriff could levy upon and sell only the right, title and interest of F. G. Mathison. The

several judgments were in favor of different plaintiffs. The law is well settled, that a partner's interest in firm property may be sold under an execution against him only, and that interest, whatever it is, will pass by such sale to the purchaser, but the purchaser takes the interest precisely as it was held by the defendant in the execution, subject to the rights of partnership creditors in and to the property so sold, and also to the rights of the other partners. If, on a settlement of the partnership affairs, the defendant in the execution is entitled to nothing, the purchaser at such execution sale will not obtain anything by his purchase. Such purchaser is compelled to settle with the other partners precisely as would the defendant in the execution, had his interest not been sold. A judgment creditor of one partner can not, by a levy upon the debtor's interest in the firm property, or a sale thereof under execution, acquire a lien superior to the rights of the other partners, or of partnership creditors; nor can the sheriff levy upon any specific article of partnership property and segregate that as the property of the defendant partner; but he must levy, if at all, upon the partner's interest in the whole stock; for the only interest the partner has in the firm property is the surplus after the partnership debts are paid, and the accounts between the partners have been adjusted. *Murfree on Sheriffs*, Sec. 545; 2 *Bates on Partnership*, Secs. 1111, 1112; *Chandler v. Lincoln*, 52 Ill. 74; *Rainey v. Nance*, 54 Ill. 29; *Richards v. Allen*, 117 Pa. St. 199; *Clements v. Jessup*, 36 N. J. Eq. 569; *Commercial Bank v. Wilkins*, 9 Me. 28; *Rice v. Austin*, 17 Mass. 197; *Wilson v. Strobach*, 59 Ala. 488.

Upon the hearing of this cause it appeared that the entire firm property was not equal in value to the mortgages placed thereon by the firm to secure partnership debts, and that all of the mortgaged property had been sold for partnership debts, leaving a portion of the same unpaid.

As to the \$72 in money, firm property, which the sheriff seized, while it was not covered by any of the chattel mortgages, and consequently could not be held thereunder, it

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was firm property. The sheriff could not, therefore, apply the same to the satisfaction of either of the executions which he held, neither of the same being against the partners, but only against a partner. It is true that it is the duty of the sheriff to obey all proper instructions given him by the plaintiff in an execution; the writ is the plaintiff's; but it is not the duty of the sheriff upon an execution against A, to levy upon the property of B, although the plaintiff may command him to do so. Nor is it the duty of the sheriff to apply firm property to the satisfaction of an execution against one of the partners, although the plaintiff may direct him so to do.

The only interest in the firm property which either of the plaintiffs, by the respective executions placed in the sheriff's hands, could reach and sell, was the interest in the firm property of the respective partners against whom such executions respectively ran, and only the interest of such partner in said \$72 could be applied to the satisfaction of such executions, or either of them.

It appeared upon the trial of this case, that neither of the persons against whom such executions severally ran, had, as against the creditors of the firm, any interest whatever in such \$72.

We are not called upon to say what the rights of the respective plaintiffs would have been had they, or either of them, filed a bill setting up that the judgments were given for firm indebtedness, and asked that as firm creditors they be allowed to prorate with, or have precedence over the Farwell chattel mortgages made subsequent to the reception by the sheriff of plaintiffs' respective executions.

The judgment of the Circuit Court is affirmed.

Charles Husche v. Fred A. Sass.

1. HUSBAND AND WIFE—*Wife has no Authority to Collect Salary Due Husband.*—An employer has no right to pay money due his employe to the employe's wife unless instructed to do so, and if instructed, must follow the terms of his authority.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice WATKINSON dissenting. Opinion filed December 14, 1896.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant.

A payment by a debtor to the wife of a creditor is a payment to the creditor, and more especially so, as in this case, where the debtor has instructions from the creditor to so pay the debt. *Haralson v. Bridges*, 14 Ill. 37; *Noble v. Nugent*, 89 Ill. 522; *Poppers v. Miller*, 14 Brad. 87.

SCHINTZ & IVES, attorneys for appellee.

A wife has no authority in law to act for her husband, except for the purpose of realizing her right to support; in all other cases she must be his agent in fact. 9 Am. & Eng. Enc. of Law, 839, Note 12; Schouler on Domestic Relations, Sec. 72.

The husband is not bound by his wife's contracts, unless they are made by his authority, or with his concurrence, except he makes no provision for her. *Martin v. Robson*, 65 Ill. 134; *Compton v. Bates*, 10 Ill. App. 78; *Gaffield v. Scott*, 40 Ill. App. 380.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee had been in the service of the appellant as traveling salesman. The appellant claims that such service terminated with the month of May, 1895, and August 16, 1895, made a statement of account, showing himself indebted to the appellee \$143.50.

In that statement the appellant charged the appellee with \$100 for which a check had been given August 14, 1895, by the appellant to the wife of the appellee, under instructions given by the latter some months before, as he was going out upon a trip, to pay to her \$25 per week for two weeks, and \$5 per week thereafter, which instructions appellant followed to the extent of paying \$75.

Aside from the consideration that such instructions could hardly be considered to remain in force seventy-five days

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after the appellee had left the service, a check of \$100 is not justified by instructions to pay \$5 per week.

Disallowing that charge of \$100, the verdict of the jury exactly agrees with the statement made by the appellant.

We need not spend time on other features of the case. The appellant is not wronged upon his own showing, for his claim of set-off for probable profits, if the appellee had not left his service, is without warrant of law. *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519.

The judgment is affirmed.

MR. JUSTICE WATERMAN dissents.

Frederic C. Weir et al. v. City of Chicago.

1. **CONTRACTS—Construction of.**—A contract provided that “when the tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth.” The prices fixed upon were * * * “rock excavation over and above cost of lineal foot of tunnel or shaft, \$2 per cubic yard.” Proof of extrinsic circumstances was admitted to explain the contract and the evidence showing that the additional price provided was reasonable and proper, *it was held* that the additional price applied to excavation wholly in rock as well as to excavation partly in rock and partly in earth.

2. **SAME—Construction of.**—Where a contract provided that “when the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick,” *it was held*, no provision having been made therefor in the contract, that no deduction could be made from the price agreed upon on account of an omission made as above provided for.

Assumpsit, for work and material. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded unless parties agree to judgment here. Opinion filed December 14, 1896.

L. D. CONDEE and LOUIS BOISOT, JR., attorneys for appellants.

67 247
165s 582

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91 443

67 247
e205s 405
e205s 453
205s 478

WM. G. BEALE, Corporation Counsel, BYRON BOYDEN, and EDWARD B. BURLING, Assistant Corporation Counsel, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

October 19, 1895, the appellants entered into a contract with the city for the construction of a tunnel under the earth for the introduction of water. Among the provisions of the contract were these :

“ Said work shall be done in accordance with plans prepared for the doing of the same, on file in the office of the Department of Public Works of said city, and with the specifications appended hereto, and made a part of this contract.

And it is understood and agreed that no claim whatever will be made by the said parties of the first part for extra work or material, or for a greater amount of money than is herein stipulated to be paid, unless some changes in or additions to said work, requiring additional outlay by said parties of the first part, shall first have been ordered, in writing, by said Commissioner of Public Works.”

And in the specifications were these :

“ The tunnels shall be lined with brick masonry, the bricks being laid longitudinally with the tunnel, with the edges toward the center, and with toothing joints. In every instance all spaces left between the outside of the regular brick work and the excavation, shall be filled in with solid brick masonry, but no allowance will be made for such additional work and material.

When the tunnel is partly in earth and partly in rock, the contractor will be paid an additional price per cubic yard for rock excavation over and above the unit price per lineal foot of tunnel in earth.

The tunnel shall be lined with brick masonry in three rings, or about thirteen inches in thickness.

When the tunnel is in rock, the brick lining may, if deemed secure by the city engineer, be reduced one ring less of brick.”

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The prices, so far as relates to this controversy, fixed by the contract, were :

“ Tunnel in earth, eight (8) feet internal diameter, sixteen dollars and sixty-five cents (\$16.65) per lineal foot.

Tunnel in rock, eight (8) feet internal diameter, fifteen dollars and ninety cents (\$15.90) per lineal foot.

Rock excavation over and above cost of lineal foot of tunnel or shaft, two dollars (\$2.00) per cubic yard.”

The appellants sued for work done in the tunnel, and recovered \$3,878.60, about which there is no controversy.

They claimed more, and the parties agreed that their differences are :

“ First. Whether or not the contractors are entitled to compensation at the rate two dollars for rock excavation per cubic yard within the cross-section lines of the tunnel, over and above the cost per lineal foot of tunnel or shaft where the work is wholly in rock.

Second. Whether or not the contractors are entitled to compensation for the removal of rock which breaks outside of the cross-section lines as indicated by the engineer.

Third. Whether the contractors are entitled to compensation for filling in with solid brick masonry outside the cross-section lines of the tunnel, called, technically, ‘back masonry.’

Fourth. Whether any allowance in respect to the third ring of brick mentioned in the contract, where such third ring is omitted by permission of the engineer, should be made either in favor of the contractors or of the city.”

First, it is contended by the city that the two dollars per cubic yard, over and above cost of lineal foot, are to be allowed only where “ the tunnel is partly in earth and partly in rock.”

The work done by the appellants was wholly in rock. If reference ought to be made to extrinsic circumstances in construing the words of the contract, it appears that in the specifications there was an “ approximate estimate of quantities ” that there would be in the work to be done by the appellants :

“ 2,000 lineal feet of eight (8) feet tunnel in earth.

18,000 lineal feet of eight (8) feet tunnel in rock.”

And it also appears that the cost of constructing the tunnel through rock was more than through earth; as the city engineer testified, “from three dollars to four dollars per foot on the average material, as we find it through here. There are places where the rock would cost a good deal more than that over the earth;” and by a calculation made by an assistant city engineer, the allowance of two dollars per cubic yard for rock, would bring the price to be paid to the appellants up to \$21.20 per lineal foot of the tunnel.

The specifications stated that “borings have been made by the city near the proposed routes of the tunnels;” but the evidence is that the earth shown by the borings was in a part of the work not reached by the appellants.

Now, the words which provide for the two dollars per cubic yard of rock excavation in addition to the cost per lineal foot, when read in the light of these circumstances, do not make an unreasonable addition to the price to be paid to the appellants, if literally enforced. On that first question we therefore hold that the appellants are in the right.

On the second and third questions, the second sentence above quoted is explicit against the claim of the appellants.

It appears that they have already been paid—how much is not shown—something for “back masonry,” as provided for in the fourth sentence quoted, which contains another express negative of any claim therefor.

On the fourth question the answer must be, that no allowance is to be made. Where the third ring is omitted by direction of the city engineer, the work is done in accordance with the specifications, as literally as would be the case if only two rings were mentioned at all.

It follows that the appellants are entitled to recover on account of the rock excavation, deducting, however, what has been paid them for back masonry. If the parties can agree upon the figures, we will enter judgment here—the case having been tried without a jury—otherwise we will reverse the judgment and remand the case for a new trial in accordance with this opinion.

Gilbert v. Kuppenheimer.

James H. Gilbert v. B. Kuppenheimer et al.

1. APPELLATE COURT PRACTICE—*What Abstract Must Show.*—Whether the evidence justified the verdict is not a question for the Appellate Court where the abstract of the bill of exceptions does not show any motion for a new trial, nor that all the evidence is in it.

2. EXPERT TESTIMONY—*What is Not.*—Whether the amount of goods purchased by a firm was unusual, is not a question for an opinion by anybody but the jury, when all circumstances are shown.

Replevin from Sheriff.—Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

JOHN W. BYAM, attorney for appellant.

TENNEY, McCONNELL & COFFEEN, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellees replevied from the possession of the appellant goods which he, as sheriff, had levied upon under execution against the firm of McBride & Kahn, upon the claim that the firm bought the goods from the appellees by practicing a fraud.

Whether the evidence justified the verdict of the jury in favor of the appellees, is not a question here, as the abstract of the bill of exceptions does not show any motion for a new trial (*French v. Hotchkiss*, 60 Ill. App. 580) nor that all the evidence is in it. *Ballance v. Leonard*, 37 Ill. 43.

The abstract contradicts the record in stating that McBride was not permitted as a witness to testify that when he bought the goods he intended to pay for them, and then the brief argues that as error, which method of presenting a case is not satisfactory.

Whether the amount of goods purchased by the firm was unusual, as compared with anything, was not a question for an opinion by anybody but the jury, when all circumstances were shown, and no error was committed in excluding the testimony.

The judgment is affirmed.

John F. Alles Plumbing Co. v. Joseph W. Alles.

John F. Alles v. Same.

Edward B. McKey v. Same.

Warwick A. Shaw v. Same.

Peter W. Anderson v. Henning Ohlssen and Anna Ohlssen.

Shea, Smith & Company (a corporation) v. Felix Trambly.

1. **APPEALS**—*Can be Taken Only in Compliance with Statute.*—Appeals are purely and only of statutory creation; and can be taken only in compliance with statutory conditions.

2. **SAME**—*How Taken.*—An appeal is accomplished only by filing the bond.

3. **SAME**—*Agreement of Parties Will Not Confer Jurisdiction of.*—A court of appeal can not acquire jurisdiction over the records of inferior courts by agreement of parties.

4. **SAME**—*From Interlocutory Orders—How Taken.*—In order to perfect the appeals from interlocutory orders allowed by statute, the bond must be filed within thirty days after the entry of the order appealed from, and must also be approved by the clerk. The statute does not contemplate that the court entering the order shall have anything to do with the appeal.

Bills in Chancery.—Interlocutory orders. Appeals from Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding in the first, second, third, fourth and sixth cases. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding in the fifth case. Heard in this court at the October term, 1896. Appeals dismissed. Opinion filed November 5, 1896.

STIRLEN & KING, attorneys for appellants in the first five cases.

SAMUEL S. PAGE and WILLIAM E. CHURCH, attorneys for appellants in the sixth case.

No appearance for appellees in the first five cases.

DALE & FRANCIS and POOLE & BROWN, attorneys for appellee, TAYLOR E. BROWN, of counsel, in the sixth case.

John F. Alles Plumbing Co. v. Alles.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The first four of these cases are appeals from an interlocutory order entered by the Superior Court, February 10, 1896, appointing a receiver of the assets of the John F. Alles Plumbing Company.

The fifth case is an appeal from an interlocutory order entered by the Circuit Court, July 3, 1896, granting an injunction restraining Anderson from doing certain things.

In neither of these five cases have any of the appellees entered any appearance in this court.

The last of the six cases is an appeal from an interlocutory order entered by the Superior Court, August 7, 1896, granting an injunction restraining Shea, Smith & Company (a corporation) from doing certain things.

This case is argued here upon the merits by briefs on both sides.

In the last three of the first four cases, the appellants, at the time the order was entered, prayed and were allowed an appeal upon filing a bond in ten days, and within ten days bonds were filed, approved by a judge of the Superior Court.

In the first of these four, March 9, 1896, the appellant prayed and was allowed an appeal upon filing a bond in ten days, to be approved by the clerk of that court, and March 19, 1896, an order was entered extending the time for filing the bond two days. March 20, 1896, a bond, approved by that clerk, was filed.

In the fifth case, August 1, 1896, the appellant prayed and was allowed an appeal, upon filing a bond in twenty days, to be approved by the clerk of that court. August 13, 1896, a bond approved by that clerk was filed.

In the last case at the time the order was entered, the appellant prayed and was allowed an appeal upon filing a bond in forty days, to be approved by the court, and September 15, 1896, on stipulation of the parties, an order was entered extending the time for filing the bond nineteen days. September 29, 1896, a bond, approved by a judge of that court, was filed.

Whether these appeals are properly here is a jurisdictional question.

The constitution, Sec. 11, Art. 6, confers upon this court jurisdiction of "such appeals and writs of error as the general assembly may provide."

The general assembly, by an act of June 14, 1887, Starr & Curtis' St., page 3171, Ch. 110, Sec. 107, enacted that "an appeal may be taken from" interlocutory orders like those here involved, "*Provided*, that such appeal is taken within thirty days from the entry of such interlocutory order." A subsequent sentence requires that "the party taking such appeal shall give bond, to be approved by the clerk of the court below, to secure costs in the Appellate Court."

It is hardly necessary to cite authority that appeals in this State are purely and only of statutory creation (*Greve v. Goodson*, 142 Ill. 355, *Farson v. Gorham*, 117 Ill. 137), and can be taken only in compliance with statutory conditions. *Tedrick v. Wells*, 152 Ill. 214; *Fairbank v. Streeter*, 142 Ill. 226; *Darwin v. Jones*, 82 Ill. 107.

And this last case (as well as the first) shows that in the then opinion of the Supreme Court, the taking of an appeal was accomplished only by filing the bond. The case was an appeal from the County Court to the Circuit Court, and by law the appeal was to be taken in the same manner as an appeal from a justice.

. An appeal from a court having no jurisdiction of the subject-matter, to a court having original jurisdiction of the subject-matter, and a trial there by consent, enables the latter court to render a valid judgment. *Randolph County v. Ralls*, 18 Ill. 29.

So also an invalid appeal from a court having jurisdiction of the subject-matter, to another court having also original jurisdiction, and a trial there, after having submitted to the jurisdiction, has the same effect. *Mitchell v. Jones*, 17 Ill. 235.

And the irregularity of taking a case by appeal to a court having jurisdiction to review on a writ of error, may be waived by submitting the case upon the merits. *Brady v. People*, 51 Ill. App. 112.

But nowhere is it held that the want of jurisdiction over the subject-matter can be waived. Consent can not give the Supreme Court jurisdiction of an appeal that should have been taken to an Appellate Court. *Fleischman v. Walker*, 91 Ill. 318; *Wright v. People*, 92 Ill. 596.

The appellants would not contend, in the face of the repeated decisions of the Supreme Court to the contrary, that appeals would lie from these interlocutory orders, but for the act of 1887. And the objection to such appeals would be jurisdictional. *Cunningham v. Loomis*, 17 Ill. 555, and cases there cited; *Village of Jefferson v. Bohemian Nat. Cem. Ass'n*, 5 Ill. App. 230.

This court can not "acquire jurisdiction over the records of inferior courts by agreement of parties." *Moore v. Bolin*, 5 Ill. App. 556.

Now that neither of these appeals was taken in compliance with the statute, is too plain for argument.

In each of them either the bond was filed more than thirty days after the order appealed from was entered, or it was not approved by the clerk. The statute does not contemplate that the court entering the order shall have anything to do with the appeal.

In many of the counties of this State—I believe, without a critical search, a large majority—the session of the court would be ended, and the judge gone elsewhere, before the thirty days in which the appeal might be taken would elapse.

The taking of an appeal under this act consists of a single act—filing a bond approved by the clerk; as the taking an appeal from the judgment of a justice is done by filing a bond with the justice, approved by him, or with the clerk of the court, approved by him.

No prayer for an appeal is to be addressed to anybody, and nobody can fix any conditions for the appeal.

If we consider these appeals on the merits, we must, to be consistent, consider all appeals from such orders supposed to be taken at any time, in any manner, and brought here by consent of parties, without any regard to the provisions of

the statute, and thus hold that the parties may confer upon this court jurisdiction forever to review and reverse orders of lower courts, in cases in which the constitution and laws of the State have not conferred such jurisdiction.

The appeals are all dismissed at the costs of the appellants, respectively.

John Purcell v. J. C. Henry.

1. PRACTICE—*Refusal to Allow Filing of Plea—When Proper.*—Where a defendant admits an indebtedness to the plaintiff, it is not error to refuse him leave to plead. The question being as to the amount due, can just as well be tried upon the assessment of damages, without a plea as with one.

2. SAME—*Motions for New Trial—When Not Necessary.*—Errors of law committed by the judge during the progress of the trial, and duly excepted to at the time, may be assigned for error in an Appellate Court, though no motion for a new trial was interposed in the trial court.

3. SAME—*Bond for Costs—When Failure to Require Not Ground for Complaint.*—It appearing from a defendant's own affidavit that a judgment for some amount should be rendered against him, a refusal to require a non-resident plaintiff to file a cost bond could, under no circumstances, injure such defendant, and he can not complain.

4. EVIDENCE—*What Competent to Prove State of Account.*—A witness who states that he is not familiar with the deliveries of goods by the plaintiff to the defendant, but is familiar with the plaintiff's books and knows "something near" the amount of goods delivered, should not be allowed to state the condition of the account between the parties without reference to the books.

Assumpsit, on the common counts. Error to the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded, unless remittitur be entered. Opinion filed December 14, 1896.

BANTZ & CASEY, attorneys for appellant.

ALLEN & BLAKE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee, as plaintiff, to re-

Purcell v. Henry.

cover from the appellant, as defendant, for a quantity of cord wood claimed to have been sold and delivered.

The defendant being defaulted for want of appearance, judgment for \$504.53 was rendered against him.

A few days later, at the same term, the defendant appeared, and upon a showing made by affidavit, the court ordered a vacation of the judgment, but refused leave to the defendant to plead.

The defendant, by his affidavit, admitting that \$233.31 was due from him to the plaintiff, it was not error to refuse him leave to plead. The only defense was as to the amount due, and that question could be just as well tried upon the assessment of damages without a plea as with one.

Subsequently, the cause was submitted to a jury to assess the plaintiff's damages, and upon the verdict for \$772.80, judgment was rendered.

Upon that trial the defendant appeared, by counsel, and cross-examined the plaintiff's witnesses, but offered no evidence in his own behalf, as he had the right to do.

The errors assigned raise the questions that the verdict was contrary to the evidence, and that there was error in admitting improper evidence.

The plaintiff testified that the oral contract he had with the defendant was to ship to him wood from Indiana, at \$3.50 a cord, less the freight to defendant's wood-yard in Chicago, and that he delivered wood to defendant under such contract, but he was unable to state how much, or what amount was due from the defendant on account thereof, he stating that his book-keeper, Riley Scholl, knew of the condition of the account. He also testified that he delivered one car load of eleven cords of a different kind of wood from that contemplated by the contract, but in answer to a question by his counsel as to the value of such wood, his answer was that "we sold it to others at four and a-half" dollars a cord.

Scholl, the book-keeper, was called, and in answer to a question by plaintiff's counsel as to whether he was familiar

with the shipments of wood by plaintiff to defendant, he answered: "No, but I am familiar with Mr. Henry's books."

This answer was followed by another question, as to whether he knew the number of cords shipped (which question was objected to by defendants, on the ground that the books would be the best evidence, but the objection was overruled and an exception duly taken to the ruling), to which he answered: "Yes, sir; something near it." Then in answer to the direct question of how many cords were shipped (to which there was also an overruling of an objection that was interposed and due exception taken), he answered, 775 11-32 cords of one kind, and eleven cords of another.

The examination then proceeded at some length, as to what amount the defendant had been credited with, and as to the value of the separate car load of eleven cords, when the court interrupted with a remark, which, together with all that followed, we quote:

"The Court: Why not find out how much they owe you?"

Mr. Blake: What is the balance due? A. That is with the amount that was paid recently?

Q. Deducting the amount paid us, what is the balance due? A. \$772.80.

The Court: That is all there is of this lawsuit, \$772.80."

And there the evidence closed.

There were no instructions given to the jury, and none were asked.

The jury then returned a verdict for the amount stated in the final remark by the judge, and judgment upon the verdict was rendered.

A motion thereupon followed to set aside the judgment, which, being continued, was, at a subsequent term, overruled and this appeal has followed.

It must be apparent, we think, that there was no competent evidence to sustain the verdict.

The only witness who testified to the condition of the

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account between the parties and to the balance due, stated that he was not familiar with the shipments of wood, but was familiar with plaintiff's books.

The books were not introduced or offered, even if they would have furnished competent evidence of anything. The only evidence of the shipment of any wood consisted in the testimony of the plaintiff that some wood was delivered, but he did not know how much, and of the book-keeper that he knew "something near" the number of cords shipped, and then went on to specify what the number was.

How it was that this witness knew, in the absence of the books, what they showed, and how he knew what shipments were made, when he had testified previously that he did not know more than "something near" to it, is not made to appear in the case.

After he had testified to what was in substance equal to saying that he knew nothing about the matter, except what the books showed, his testimony was properly objected to, and the objection was improperly overruled.

Book accounts can not be proved in such a way, and shipments or deliveries of goods are required to be proved by the testimony of a witness who knows of them, or by some other competent evidence. Neither course of making the proof was observed in this instance.

But it is said that the error can not be urged because there was no motion for a new trial.

To deny that there was a motion for a new trial, is to assume that the motion to vacate the judgment was not equivalent to a motion for a new trial. But, however that may be, the incompetent testimony was objected to, and the grounds of the objection stated, as soon as it was offered, and the ruling of the court in overruling the objection was promptly excepted to.

The late Mr. Justice Bailey stated the rule to be as follows:

"The rule seems to be that errors of law committed by the judge during the progress of the trial and duly excepted to at the time, may be assigned for error in an Appellate

Court, though no motion for a new trial has been interposed in the trial court. * * * Alleging in a motion for a new trial errors of law committed during the trial, is merely calling upon the judge to decide a question which he has already determined, a second time. * * * The view above expressed is fully sustained by *Smith v. Gillett*, 50 Ill. 290, where, after consideration of various authorities, it was held that a decision of the trial court improperly excluding competent evidence, if excepted to at the time, may be assigned for error in an Appellate Court, though no motion for a new trial has been made." *Leyenburger v. Paul*, 25 Ill. App. 480.

There was no exception taken to the final remark of the court, which, it is argued, was what the jury predicated their verdict upon, and we will not comment concerning it.

Probably the plaintiff should have been required to file a bond for costs, but it appearing from defendant's own affidavit that a judgment for at least \$233.31 should go against him, it does not appear that the error, if it were such, in denying his motion that plaintiff be required to file a bond, could, under any circumstances, injure him.

The judgment will be reversed and the cause remanded, unless the appellee shall elect, within ten days, to remit from his judgment down to the sum of \$233.31, admitted by the defendant to be due.

Henry R. Huntington v. Eva Aurand.

1. WORDS AND PHRASES—*Appeal Bonds—Construction.*—The legal effect of the words in an appeal bond that the obligor will pay the amount of "judgment, costs, interests and damages rendered and to be rendered against him," is that he shall pay the judgment already rendered against him, and such judgment as shall be rendered against him by the Supreme Court in case the judgment appealed from shall be affirmed. Such words do not include a judgment thereafter rendered upon new evidence on a hearing *de novo*, as to the subject of such judgment.

Huntington v. Aurand.

Debt, on an appeal bond. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed in part. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

This was an action of debt on an appeal bond of \$1,000, on an appeal from the Appellate Court to the Supreme Court of this State, in the case of Aurand v. Aurand, reported in Ill. App. 55, p. 426, and Aurand v. Aurand, 157 Ill. 321, Ambrose J. Aurand taking the appeal and appellant being the surety on the appeal bond. This action was brought against the principal and his surety.

The Supreme Court heard the case at the October term of that court, 1895, and on full consideration affirmed the judgment of the Appellate Court, it being a bill for separate maintenance. The Appellate Court, on appeal, having modified the decree of the Circuit Court, directed that the cause be remanded to the Circuit Court to enter a final decree, as modified by said Appellate Court, which was accordingly done, which is the decree in evidence in the record in this case.

The judgment and decree of the Appellate Court in the case of Aurand v. Aurand affirmed the decree of the Circuit Court in every respect, except reducing the amount to be paid appellee per month from \$50 to \$30 per month. The final decree, as directed by the Appellate Court, was that the said Ambrose J. Aurand pay to appellee, his wife, \$30 at the end of each month until the further order of the court, commencing the 16th day of May, 1894, \$30 on the 16th day of June following, and \$30 at the end of each succeeding month, for appellee's support.

By the terms of the final decree and supplemental decree, there was due on the 16th day of January, 1896, \$80, and \$80 was due on the 16th day of February, March and April following, with interest, making the total amount \$323.50, for which this suit was brought, and judgment rendered for said amount, and appeal taken to this court by appellant. But \$200 of this was made up of four installments of \$50 each, which was for the first time allowed and ordered

paid in the decree entered after the cause had been remanded by the Supreme Court to the Circuit Court.

FRANK SOALES, attorney for appellant; R. FRANKENSTEIN, counsel.

F. S. MURPHEY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The condition of the bond upon which this suit was brought, is, in part, as follows:

"Now, therefore, if said Ambrose J. Aurand shall duly prosecute his appeal with effect, and moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him, the said Ambrose J. Aurand, in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue."

The words "judgment, costs, interest and damages rendered and to be rendered against him," do not include a judgment thereafter rendered upon new evidence and consideration on a hearing *de novo* as to the subject of such judgment. The legal effect of the words above quoted, is that he shall pay the judgment already rendered against him, and such judgment as shall be rendered against him by the Supreme Court, in case the judgment appealed from shall be affirmed. *Rothgerber et al. v. Wonderly*, 66 Ill. 390.

As to the unpaid installments for alimony, amounting to \$120, and interest thereon, \$3.50, the Circuit Court properly gave judgment.

As to the \$200 solicitors' fees, not adjudged until after bond was given, the plaintiff was not entitled to judgment.

The cause having been tried without a jury, the judgment of the Circuit Court is affirmed for \$123.50, and reversed as to the residue.

Appellant will recover costs in this court.

Affirmed as to \$123.50, and reversed as to residue.

Geraghty v. Organ.

Patrick Geraghty et al. v. Roger R. Organ.

1. **EQUITY PRACTICE—*Allegations and Proofs.***—In equity practice the allegations and proofs must correspond. A party will not be entitled to relief although the evidence may establish a clear case in his favor, unless there are averments in his bill to support the case made by the evidence.

2. **VARIANCES—*The Rule in Equity.***—In equity a variance between the pleadings and proofs need not be specifically pointed out in the court below in the first instance, in order to raise the question in the Appellate Court. The rule in equity in this respect is different from what it is at law.

Mechanic's Lien.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

ARND & ARND, attorneys for appellants.

THOMAS J. O'HARE, attorney for appellee; MICHAEL J. AGNEW, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee filed his petition to enforce a mechanic's lien against the premises of the appellant, for a balance claimed to be due him under a contract for the construction of a building.

It is contended by appellants that there was such a parol variation between the contract alleged to have been entered into between the parties, and to have been performed by the appellee, and the proofs, as to require a reversal of the decree that appellee obtained.

The petition alleged the making of a contract in writing, between the appellee, as petitioner, and the appellant Patrick Geraghty, and averred that immediately after the making of the contract, he, the appellee, commenced work under the same, and, in compliance therewith, furnished all

the material and labor for the completion of the contract, "and did in all respects comply with the terms of said contract and specifications and drawings therein referred to."

The written contract, and the plans and specifications, were offered in evidence. The contract, not including the plans and specifications, was as follows:

"CHICAGO, ILL., May 8, 1894.

This is to certify that Roger R. Organ, mason and general contractor, is to build a Bld. at 4620 Cottage Grove Ave., for the sum of (\$6,000) six thousand dollars, everything complete, according to the plans and specifications, except mantels and furnaces. Stone front.

ROGER R. ORGAN,
PATRICK GERAGHTY,
J. DEMARIA."

It is not necessary to refer to the contents of the specifications, or to the drawings of the plans, further than to say that in several particulars, admitted by the appellee, there were substantial changes and omissions in them, made by oral agreement between the owner and the contractor, after they were prepared, and either before the contract was signed, or during the progress of the work.

As nearly as we can understand, from what does not seem to be a very intelligently connected statement by the appellee himself, these oral changes came to be made under the following circumstances:

The appellant, having in contemplation the erection of a building on the lot in question, had his attention directed to a building in another part of the city as one that would be desirable to duplicate on his lot, and he was pleased with it, except that it was some six feet less in depth than he wished his to be. The plans and specifications were, accordingly, prepared, and appellee made a bid to put up the building in accordance with them, for \$7,000. The appellant was not able, or willing, to pay so much, but offered to pay \$6,000. And it was then agreed by the parties to substitute rubble stone for dimension stone in the foundation, to omit plastering the basement and to change the

Geraghty v. Organ.

sizes of the roof and ceiling joists, besides other less material matters; and then the contract was signed for the price of \$6,000, but without making any change in the specifications.

Afterward, and during the progress of the work, other less important variations were agreed to orally, and made in the construction, particularly of chimneys, etc.

The appellee should have amended his petition when the proof of these changes was made, if he wished to avoid the objection to his decree that has been interposed.

It has been a long established rule in equity practice, that the allegations and proofs must correspond, and that a party will not be entitled to relief, although the evidence may establish a clear case in his favor, unless there are averments in the bill to support the case made by the evidence. *Morgan v. Smith*, 11 Ill. 194.

The allegation is specific, that appellee performed according to the terms of the "contract and specifications and drawings."

Appellee's own testimony shows clearly that he did not so perform, but that, on the contrary, he performed under a verbal agreement with the appellant, or under an agreement partly in writing and partly oral.

But appellee insists that the variance was not specifically pointed out in the court below. We need not look to see whether it was or not. The rule is different in equity from what it is at law in that respect.

We will not discuss the other reasons, either in favor of or against a reversal of the decree. The one question we have dealt with appears to be the only important one, or at least the only one for which a remedy by amendment will not readily suggest itself.

The decree must be reversed and the cause remanded, when the appellee may amend if he so elects, and have a hearing upon a petition that will be supported by the evidence.

Reversed and remanded.

**Charles M. Linington v. David Dickinson, Vermont
Marble Company and Malcolm J. Browne.**

1. VOLUNTARY ASSIGNMENTS—*Effect of Dismissal of Proceedings upon Dissenting Creditor.*—As against the subsequent dissent of a non-assenting creditor, the order of the County Court dismissing the proceedings under the assignment of the debtor, if made before the expiration of three months allowed to creditors to present their claims, is ineffectual as a bar to any effort by such creditor to obtain his portion of satisfaction from the assets.

2. SAME—*When a Majority in Number and Amount of Creditors May be Ascertained.*—Under section 2 of the act concerning voluntary assignments, creditors have three months in which to present their claims, and until that period has elapsed it is impossible to tell what constitutes a majority of the creditors “in number and amount,” so as to comply with section 15 of such act.

In Equity.—Bill for relief. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

SMILEY & CLARK, attorneys for appellant; McGARRY & NICHOLS, counsel.

OTIS H. WALDO and WILSON, MOORE & MCILVAINE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The record shows that the case which the appellant claims exists, is, that August 16, 1895, he made an assignment for the benefit of his creditors to the appellee Dickinson. About November 1, 1895, the appellant made a settlement with his creditors, and the appellee Dickinson returned the property to the appellant, less \$10,000 for services of Dickinson and his attorney, which the appellant admits he assented to, but now complains that it was \$7,000 more than ought to be allowed for those services.

Next, January 9, 1896, Dickinson made an assignment to

Linington v. Dickinson.

the appellee Browne, for the benefit of his, Dickinson's, creditors.

February 10, 1896, the appellant presented to the County Court, *in re* the latter assignment, his petition that he should be allowed that \$7,000 as a preferred claim against the assets of Dickinson, and "have such other, further or different relief in the premises as to the court shall seem meet." That in the afternoon of the same day, without notice to the appellant, through a combination between the appellees, the County Court was induced to dismiss the proceedings upon the assignment of Dickinson, and appellee Browne returned all the assets to Dickinson, who immediately transferred them to the Vermont Marble Company, which claims them as its own.

Now this bill by the appellant is filed, by which he asks such relief as he may be entitled to. The appellees severally demurred, and the court sustained the demurrers, and dismissed the bill.

It is not to be supposed that the bill is as free from opprobrious charges as the condensation I have attempted.

Now, without going into detail of what kind of relief, if any, the appellant may be entitled to, for such detail would be premature at this stage, we do hold that his bill is such as entitles him to an inquiry into the facts. A fiduciary relation existed between the appellant and Dickinson when the proceedings under the assignment of the appellant stopped, and whether Dickinson retained too much of the assets, is a question on which the burden is upon him. *Fox v. Mackreth* and notes, 1 Equity L. C., 115, star paging; *Huguenin v. Baseley*, and notes, 2 Ibid. 556, star paging.

Whether, should it be determined that he retained too much, a claim for preference over other creditors of Dickinson could have been allowed, we will express no opinion.

As against the subsequent dissent of a non-assenting creditor, the order of the County Court dismissing the proceedings under the assignment of Dickinson, was ineffectual as a bar to any effort by such creditor to obtain his portion of satisfaction from the assets.

Creditors have three months in which to present their claims. (Section 2 of the act concerning voluntary assignments.) Until that period has elapsed, it is impossible to tell what constitutes a majority of the creditors "in number and amount," so as to comply with Sec. 15. *Union Nat. Bank v. Doane*, 140 Ill. 193.

The doctrine of *Howe v. Warren*, 154 Ill. 227, as explained in *Terhune v. Kean*, 155 Ill. 506, entitles the appellant to an inquiry in a court of equity as to the validity of his claim against Dickinson, and to what extent, if at all, the other appellees may be responsible, if such claim is sustained.

The decree sustaining the demurrers and dismissing the bill is reversed, and the cause remanded for such further proceedings as to law and justice may appertain. Reversed and remanded.

After the foregoing opinion was filed, the appellees here prayed an appeal to the Supreme Court from the judgment of this court upon the theory that such judgment settled the rights of the parties, and was therefore a final judgment.

With some misgiving this court acceded to that construction, and allowed the appeal upon a bond of \$9,000 to be filed by the appellees.

They remonstrate as to the amount, but we see no reason to reduce it.

Whether the theory be correct or not, if we adopt it, our action must be consistent with it. If, therefore, we allow an appeal, the condition of the bond, which stays the taking of such account, and puts upon the appellee all the risk of changing circumstances, should be to pay what may ultimately be recovered, and the penalty and security should be such as to insure the performance of the condition.

Trench v. Hardin County Canning Co.

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Daniel G. Trench, doing business as Daniel G. Trench & Co., v. Hardin County Canning Co.

1. WORDS AND PHRASES—*Express Warranty*.—The words, “understand we quote you only on cans that are well made, tested, and perfectly satisfactory for your work,” contained in a letter in which was a quotation of prices and an offer of sale, amount to an express warranty that the cans are to be good and first-class in every particular and suited to the buyer’s business.

2. AGENTS—*When Personally Liable*.—Where an agent deals with third persons who have no knowledge of his principal, his undertakings will bind him personally.

3. PRACTICE—*What is Not a Misjoinder*.—The joinder of common and special counts in assumpsit is not a misjoinder.

4. VARIANCE—*What is Not*.—The fact that letters in which was contained a contract bore a date different from that named in the declaration upon the contract as the day when it was made, is no variance.

Assumpsit, upon a contract, etc. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STEPHEN G. SWISHER and W. N. HORNER, attorneys for appellant.

PRENTISS, HALL & GREGG, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The dealings between these parties began by a letter from the appellee to the appellant, inquiring the price of “cans”—as the case shows, tin cans in which to pack comestibles.

The appellant replied, his letter containing this clause :

“Sellers guaranteeing to pay for all cans and contents spoiled by leaks exceeding two cans to the thousand, leaks to be held subject to the order of seller.”

All of the letters—and there were many—from the appellant to the appellee, were on letterheads as follows :

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“Trench, DANIEL G. TRENCH & Co.,
Chicago. Canning Factory Outfitters and Brokers
in Cans, Canned Goods, Tin Plate & Metals.
31 Lake Street, Chicago.”

Without following the details, the result was that the appellee bought 100,000 cans, which were shipped by a firm of Ranney & Phelps of Lewistown, Ill., with a bill of lading and draft by them on the appellee, attached, which the appellee paid.

The appellee began to use the cans, and then sent to the appellant this letter:

“HARDIN COUNTY CANNING COMPANY,
Successors to Elizabethtown Canning Company,
Packers of Choice Canned Goods.

ELIZABETHTOWN, KY., Aug. 5, 1893.

Messrs. Daniel G. Trench & Co., Chicago, Ill.

GENTLEMEN: The car load of two-pound cans we bought of you were not near so good as the sample you sent us, as far as appearances were concerned. They are a very rough lot of cans. This week we commenced packing, and we are sorry to inform you that the number of leaks is very much greater than the guarantee calls for, and that the leaks come from the cans themselves. Of course we expect to hold you to your guarantee, and we advise you now so that we can both be properly protected. We have had practical tanners to examine the cans, and we are prepared to substantiate all statements as to leaks. It might be to your interest to send a man here to examine them. Let us hear from you, as we want to do the proper and square thing. But this is not a year for leaks in anything.

Respectfully, H. A. SOMMERS,
Pres. H. C. C. Co.”

To which appellant replied:

“Trench, DANIEL G. TRENCH & Co., Chicago.
Canning Factory Outfitters and Brokers in Cans, Canned
Goods, Tin Plate & Metals, 31 Lake Street.

CHICAGO, August 23, 1893.

Harding County Canning Co., Elizabethtown, Ky.

DEAR SIR: Your favor in regard to leaks received.

Trench v. Hardin County Canning Co.

Dump the cans. We have perfect confidence in your count. Your claim will be paid on basis of cost of cans and contents, and you know this means packer's cost—about sixty-five cents per dozen would be right; we have never settled at a higher cost than this in your section. We will send you check if this is satisfactory.

Yours truly,

DANIEL G. TRENCH & Co."

And the appellee answered:

"HARDIN COUNTY CANNING COMPANY,
Successors to Elizabethtown Canning Company,
Packers of Choice Canned Goods.

ELIZABETHTOWN, KY., August 26, 1893.

Daniel G. Trench & Co., Chicago, Ill.

GENTLEMEN: In reply to your favor of August 23d, we expect it would be right to accept your terms of sixty-five cents per dozen for the "leaks." You need not, however, send check for the number already discovered, but we will wait and send you bill at the end of the season for the total amount. We are having a good deal of trouble with the cans, but the number of leaks is not so large as last week.

Respectfully,

H. A. SOMMERS."

There is testimony that Ranney & Phelps mailed, and that the appellee did not receive the following:

"LEWISTOWN, ILL., April 8, 1893.

Hardin County Canning Company, Elizabethtown, Ky.

GENTLEMEN: We are shipping you to-day, freight prepaid, a car containing 100,000 2-pound cans, 1½-inch opening, as per sale made to you through Messrs. D. G. Trench & Company, Chicago. We have drawn on you through Messrs. Turner, Phelps & Company, bankers, for \$1,950, and attached invoice and bill of lading to the draft. Kindly honor the same on presentation. Thanking you for your valued order, we are, very truly yours,

RANNEY & PHELPS."

These letters appear in the case :

“ DANIEL G. TRENCH & Co.,
31 Lake street.

CHICAGO, Sept. 8, '93.

Hardin County Canning Co., Elizabethtown, Ky.

DEAR SIRs: Mr. Marriott called on us to-day and read your letter in regard to cans. We at once wired the manufacturers to send a man to your place at once to look up the matter.

Yours truly,

DANIEL G. TRENCH & Co.”

“ HARDIN COUNTY CANNING COMPANY,
Successors to Elizabethtown Canning Company, Packers of
Choice Canned Goods.

ELIZABETHTOWN, KY., Sept. 11, '93.

Daniel G. Trench & Co., Chicago, Ill.

Your letter to hand stating that you had a talk with Mr. Marriott, who called at your office in regard to the leaks in cans we bought of you, and that you had wired the manufacturers to send a man here at once to investigate. The man has not come yet, and he should come at once and the matter settled up. For a small concern we are bound to lose by the bad cans anyway, but we certainly do want a settlement as per agreement. Let us know at once when the representative of the manufactory of the cans will be here.

Respectfully,

H. A. SOMMERS, Pres.

P. S. Who made these cans, anyhow ? ”

No reply to the latter appears.

Thus far, the relations of the parties seem to have been amicable, and the first indication we find of trouble is in this letter :

“ DANIEL G. TRENCH & Co.,
Canning Factory Outfitters and Brokers in Cans, Canned
Goods, Tin Plate & Metals, 31 Lake St.

CHICAGO, Oct. 31, '93.

Hardin County Canning Co., Elizabethtown, Ky.

DEAR SIRs: Your favor received. It will be useless to

Trench v. Hardin County Canning Co.

draw on us as suggested. Your settlement of this matter of claim lies with the sellers of the goods on whom we gave you contracts (see inclosed copy of contracts), Messrs. Ranney & Phelps, of Lewistown, Ill. Your communications bearing on this subject and the bill you rendered have been submitted to them, and from their correspondence we had hoped that before this some member of their firm would have called on you. This seems difficult to arrange, as both Mr. Ranney and Mr. Phelps have been quite busy. They have now, however, commissioned our Mr. I. V. McCagg to visit your place and make report on the cans and your claim in general. Mr. McCagg leaves here on Thursday of this week for your city. Writer will be absent from Chicago for about ten days, leaving to-night for Baltimore. Kindly, in meanwhile, communicate with Messrs. Ranney & Phelps on any points touching the claim which you may desire to communicate.

Yours truly,

DANIEL G. TRENCH & Co."

The evidence is that the appellee packed 60,000 cans, of which 21,004 leaked, and 40,000 cans remain empty. The appellee sued to recover the price of the leaky cans, and sixty-five cents per dozen for the contents, as well as the price of the cans not used. The verdict covered the leaky cans and contents only.

The only objection of the appellant which can be considered as going to the merits, except surmises, not supported by any evidence, as to fair dealing by the appellee, is that the appellant acted only as agent for Ranney & Phelps, and the recourse of the appellee is to them.

Omitting the letter of Ranney & Phelps of April 8, 1893. the receipt of which is denied by the appellee, there was, so far as the record shows, no notice to the appellee that the appellant was not the principal.

And even yet there is no evidence that he had authority from Ranney & Phelps to bind them "to pay for all cans and contents spoiled by leaks," etc.

Without such proof, his undertakings bind him personally. *Wheeler v. Reed*, 36 Ill. 81.

"Dump the cans" in the letter of appellant to appellee of August 23, 1893, was not a direction to fill no more. Three days later the appellee wrote a letter, showing that it was going on to fill the cans, and it does not appear that the appellant was dissatisfied.

The letter from which the first quotation is made contained the sentence: "Understand we quote you only on cans that are well made, tested and perfectly satisfactory for your work."

Those words are an express warranty that in legal effect does not vary from that alleged in the second count, that the appellant promised that the cans "should be good and first-class in every particular, and suited to the" appellee's "business." And the first quotation fixes the damages if the warranty should be broken.

We can not occupy much space replying to arguments that the pleading upon an implied and express warranty are different, contrary to 1 Ch. Pl. 309, Ed. 1893, or to showing that *Parkinson v. Lee*, 2 East, 314, which decides that a sale by sample is not a warranty that the article is merchantable, is inapplicable here.

That none of the letters were dated on the day that in the declaration it was alleged that the contract was made, is no variance. *Brown v. Smith*, 3 N. H. 299.

That joinder of common and special counts in assumpsit is not a misjoinder, needs no authority.

There is no error, and the judgment is affirmed.

James Pease v. Hattie Barkowsky.

1. MARRIED WOMEN—*Separate Property—Advances to the Husband in Trade.*—If a married woman advances her separate money and places the same in the hands of her husband, for the purpose of carrying on any general trade, though in the wife's name, and the husband by his labor and skill in that undertaking, increase the funds, the entire capital embarked in the enterprise, together with the increase, will not constitute a separate estate of the wife, but will be liable for the debts of the husband.

67	274
71	326

67	274
87	696

Pease v. Barkowsky.

2. *SAME—Wife's Capital—Earnings of the Husband.*—If the wife furnishes the original capital to commence a business, and the husband conducts it, and through his labor and skill contributes largely to increase the capital stock, the addition so made does not become the separate property of the wife so as to be beyond the reach of the husband's creditors.

3. *SAME—When the Wife's Advances to the Husband May be Regarded as a Loan.*—Where the wife advances capital to commence a business to be carried on by the husband, and the proceeds of his labor and skill become so interwoven with the capital of the wife as to render identification quite impossible, the wife loses the right to reclaim her property, and the transaction may be regarded, so far as his creditors are concerned, as a loan of the wife's money to the husband.

4. *CROSS-EXAMINATION—In Cases Involving the Wife's Separate Property.*—In controversies involving the rights of property between the wife and creditors of the husband, the manner in which the husband worked, to whom he accounted, the fact, if it is a fact, that the wife never received any money from him and that he never accounted to her, her knowledge of the contract under which he worked, are matters concerning which opposing counsel should be allowed to cross-examine the wife.

5. *PRACTICE—Time Allowed for Arguing Cases.*—The time in which counsel are to be permitted to argue a case before a jury, rests in the sound discretion of the court.

6. *TRIALS—Misconduct of Counsel.*—For an improper remark to the jury during the argument of a case counsel should be severely rebuked so that he may derive no benefit from such remarks.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

WILLIAMS & CRAFT, attorneys for appellant.

RALPH M. SHAW, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of replevin.

Phillip Shugg, having obtained a judgment against the husband of appellee, levied upon the fixtures and stock of a saloon of which appellee claims to be the owner and proprietor, whereupon she brought this action.

The license for the saloon was issued to H. Barkowsky

upon a bond signed "H. Barkowsky," appellee's husband making the signature. Appellee did not sign the bond.

The judgment under which the levy was made, was, it appears, obtained by Shugg for money due him for working about the saloon, driving a beer wagon.

Appellee testifies that she hired appellee; that he worked for her; but just why, if this be the case, she has not paid him, or does not pay the judgment obtained for such service, does not clearly appear.

Shugg testifies that he was employed by appellee's husband, and that the husband was the proprietor of the saloon, to whom he, Shugg, accounted for sales.

That the husband did have a great deal to do with the running of the saloon, clearly appears; that he and his children worked much, there, is manifest.

The evidence is such in this regard, that the law will scrutinize carefully the transactions by which it is claimed that the wife is now the owner of the entire fruit of the joint labors.

A man's labor and skill in any trade or branch of business is valuable capital, and it is as unlawful for him to appropriate the results of that labor and skill to the exclusive use of his wife, as her separate property, as it would be to thus appropriate his money to the detriment of his creditors.

If a married woman advances her separate money and places the same in the hands of her husband, for the purpose of carrying on any general trade, though in the wife's name, and the husband by his labor and skill in that undertaking, increase the funds, the entire capital embarked in the enterprise, together with the increase, will not constitute a separate estate of the wife, but will be liable for the debts of the husband.

If the wife furnish the original capital to commence a business, and the husband conduct it, and through his labor and skill contributes largely to increase the capital stock, the addition so made does not become the separate property of the wife, so as to be beyond the reach of the husband's creditors. It is not the wife's property, but the proceeds of the husband's

Pease v. Barkowsky.

labor and skill that the creditors have a right to claim, and if so interwoven with the capital of the wife as to render identification quite impossible, the wife loses the right to reclaim her property, and the transaction may be regarded, so far as concerning the creditors, as a loan of the wife's money to the husband, by means of which he engaged in trade. *Wilson v. Loomis*, 55 Ill. 352; *Patton v. Gates*, 67 Ill. 164; *Robinson et al. v. Brems*, 90 Ill. 351; *Lachman et al. v. Martin et al.*, 139 Ill. 450; *Guill et al. v. Hanny*, 1 Ill. App. 490; *Card v. Robinson*, 2 Ill. App. 19.

In such a case as this, considerable latitude must be allowed in cross-examination of the party claiming to be the owner of the entire property.

We think that the manner in which Mr. Shugg worked, to whom he accounted, the fact, if it be, that appellee never received any money from him, and that he never accounted to her, her knowledge of the contract under which Shugg worked, and her conversation with him when he left, were matters concerning which appellant should have been allowed to cross-examine her. So, too, statements made by her agents in matters concerning which they had a right to speak and act for her, and which she, as against Shugg, received the benefit of, and upon the truth of which he acted in his suit brought against her and her husband to recover for moneys by him earned while working in the saloon, were admissible.

The time within which counsel are to be permitted to argue a case before a jury, rests in the sound discretion of the court; it would seem as if fifteen minutes was a very brief time in which to discuss the conflicting evidence in this cause, wherein thirty-six witnesses testified, and the evidence was voluminous.

Counsel should have been severely rebuked, in a manner so that he would get no benefit therefrom, for his improper remark to the jury concerning the alleged murder of Clarence White.

The judgment of the Circuit Court is reversed and the cause remanded.

David B. Shively and Annie Shively v. John P. Hettinger.

1. APPELLATE COURT PRACTICE—*Abstract Must Show upon What Errors are Based.*—Alleged errors not based upon anything appearing in the abstract of the record will not be considered by the court.

Assumpsit, on a special contract. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

DUNCOMBE & BUTLER, attorneys for appellants.

WARWICK A. SHAW, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellee, as plaintiff, against the appellants, as defendants, to recover upon what the evidence tended to show was a special contract for the making of plans and specifications by the appellee, as an architect, for a building proposed to be erected by the appellants.

The only information which the abstract furnishes concerning the declaration, is that in one place it speaks of a "journal entry of order granting leave to file new declaration in lieu of lost declaration," and in another place it mentions "new declaration," and in yet another place it mentions that leave was granted to file "additional counts" *instant*.

No sort of information is given as to what was contained in either declaration, or in the additional counts. Under such conditions, we must assume that the declaration fitted the proofs.

That alleged errors not based upon anything appearing in the abstract of record, will not be considered by the reviewing tribunal, has been decided so many times that authority for it should no longer be thought necessary, but

67	278
68	428
67	278
70	138
70	195
67	278
77	52

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the latest expression of the rule by the Supreme Court may be seen in *Strohm v. The People*, 160 Ill. 582.

In this court the decisions have been numerous, and many of them are collected in *Shields v. Brown*, 64 Ill. App. 259.

The abstract does not show that any motion for a new trial was made in the court below, and therefore all errors that have been assigned for causes which can only be raised by interposing such a motion, are out of the case in this court.

But if it be said that there were such errors committed by the trial court as do not require that a motion for a new trial be interposed in order that they may be assigned for error, either in the admission or rejection of evidence, or in the giving or refusal of instructions, we can only say that it is impossible, without the declaration before us, to pass intelligently upon the first, and that as to the last, the abstract does not show that an exception was taken to the action of the court with regard to any instruction either given or refused.

For anything appearing in the testimony, as abstracted, and as supplemented by what may be regarded as a further abstract of the testimony contained in the brief of appellee, we can not say that the jury were so clearly wrong in believing the appellee in preference to believing the opposed testimony in behalf of the appellants, as for that reason to justify a reversal of the judgment.

There clearly was evidence, though not very strong, that tended to support the verdict upon a theory that there was an express contract declared upon, under which the appellants were jointly bound.

Mrs. Shively was present and participated in some of the conversations between her husband and the appellee, and it was stipulated that she owned the ground upon which the building was proposed to be erected, and there was evidence that tended to show, though not very strongly, that she assented to a contract with the appellee, to make the plans and specifications at an agreed price.

Upon the record that is before us, we can only affirm the judgment.

Illinois Steel Company v. Thomas Szutenbach.

1. VERDICTS—*Not Set Aside for Mere Irregularity.*--A mere informality or mistake of an officer in drawing a jury, or mere irregularity or misconduct of the jurors themselves, is not sufficient ground for setting aside a verdict where the party complaining could not have sustained injury thereby, or where the irregularity is one of which the party was aware, and failed to object to, or could, had he attempted, have prevented.

2. JURIES—*Must be Composed of Persons Designated According to Law.*--A verdict not rendered by the persons designated and selected according to law, but by others who, by means of fraudulent practices, obtained seats in the jury box, heard the evidence and returned a verdict, having no right or authority to do so, and a judgment entered in pursuance of such verdict, should be set aside upon the motion of the injured party, if he be innocent of the iniquity.

3. VERDICTS—*Rendered by Illegal Jury—Effect of.*--Where the facts in controversy have not been determined in accordance with the law, or by such a jury as the parties have a right to be heard by, the verdict and judgment can not stand, and the court will not inquire whether they are, as between the parties, just or not.

Motion, to set aside judgment. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

In 1892, Thomas Szutenbach instituted suit against the Illinois Steel Company for personal injuries. This case was tried before Judge Chetlain and a jury in December, 1895, resulting in a large verdict against the defendant. From the judgment upon this verdict the Steel Company prosecuted an appeal, which was heard in this court at the March term, 1896. While the case was thus before the court, and after it had been taken under advisement, it came to the knowledge of defendant's attorneys that one of the persons who sat upon the jury in the case, under the name of William Tracy, participating in the deliberations of the jury and signing the name of William Tracy to the verdict, was

Illinois Steel Co. v. Szutenbach.

not William Tracy at all, but was known by the name of Charles Cornell. William Tracy was, during 1895, a foreman employed in the county building, residing in that part of the city of Chicago known as the North Division. In personal appearance he is tall and dark; Cornell, on the other hand, is not over middle height, his hair is not dark, and his figure is rather stout, and his place of residence is in the West Division of Chicago. Tracy had received a summons to appear before Judge Chetlain to serve upon the jury during the month of December; this summons had been given by him to one Conroy, who was a mechanical engineer in the county building, and Tracy's superior; by Conroy the summons was given to Charles Cornell, and was the only summons which Cornell received.

As soon as the facts became known to the defendant's attorneys, a motion was, on the 9th of June, 1895, submitted to the trial court, asking that the verdict and judgment should be set aside, this motion being by that court taken under advisement.

Subsequently, defendant's attorneys discovered that the name of Cornell was itself an alias. Early in September defendant's attorneys learned the history of the man. His real name is Michael Farrell. He came from Philadelphia, and had served three terms in prison, the last term being one of three years in Cherry Hill penitentiary, for highway robbery. These facts were shown to the trial court on the 16th of September, by the records of Farrell's commitments in Philadelphia, certified under the seal of the Criminal Court of Philadelphia; also by the affidavit of Michael Farrell himself.

As soon as the defendant filed its first motion in the trial court, Judge Chetlain issued a warrant for the arrest of Charles Cornell upon the charge of contempt of court. The hearing upon this charge was held before Judge Chetlain early in June, and on the 10th of that month Cornell was sentenced to four months in the county jail. His affidavit made in September, was signed by him during his confinement upon this sentence.

On the 28th of September the trial court denied the defendant's motion, and from this order the present appeal is prosecuted.

There is in the record here now presented, the affidavit of one of the jurors to the effect that Farrell, during the deliberations of the jury, voted for a heavy assessment of damages. As nearly as the juror can remember, Farrell's vote was in favor of a verdict of about \$20,000.

E. PARMALEE PRENTICE, attorney for appellant.

The jury guaranteed by the constitution is a jury of twelve lawful men. Thompson on Trials, Sec. 3; *Bibel v. The People*, 67 Ill. 172.

A person whose name is not on the panel of jurors, who falsely personates one whose name is on the panel, and while so personating serves upon the jury, is not a juror, and the verdict rendered by such a person and eleven jurors is the verdict of eleven men only. *Dayton v. Church*, 7 Abb. N. C. 367; *People v. Ransom*, 7 Wend. 416; *Norman v. Beaumont*, Willis, 484; *King v. Tremain*, 7 Dowl. & Ryl. 684; *Dovey v. Hobson*, 6 Taunt. 460; *Stripling v. The State*, 3 S. E. Rep. 277.

KAVANAGH & O'DONNELL, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We can not regard a judgment which is regular upon its face and would afford ample protection to a sheriff or other officer acting thereunder, as a nullity, whatever fraud may have been practiced in the obtaining of the same, or whatever falsehood the record may actually speak as to the methods pursued in obtaining, or the persons by whom the verdict and judgment were rendered. A void thing, or that which is a nullity, is no thing, and will afford protection to no one acting thereunder. The question with which we have to deal is, not what the force and effect of this judgment was as it once stood, fair and unimpeached upon the

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record, but how it is to be regarded, now that it has been made clear that there entered into the rendering of the same, fraudulent and criminal practices of the most flagrant nature.

The constitution of this State guarantees to each person the right of trial by jury, and this, with the exceptions named in that instrument, means a trial by a jury of twelve men. Thompson on Trials, Sec. 3; *Bibel v. The People*, 67 Ill. 172.

A mere informality or mistake of an officer in drawing a jury, or a mere irregularity or misconduct in the jurors themselves, is not sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court is satisfied that the party complaining could not have sustained any injury from it, or where the irregularity is one of which the party was aware, and failed to object to, or could, had he attempted, have prevented.

Only such person as has been and is duly qualified to sit as judge, can so act and sit in a judicial trial; even though the parties to the litigation stipulate, and have entered of record, their agreement that another person may so act. If the record show that a person not a judge has, by agreement of all the parties to a cause, tried the same and claimed to enter judgment therein, which has been placed upon the records of the court, yet it appearing upon the face of the proceedings, the judgment record or roll, that the trial and so-called judgment were by a person not a judge, the proceeding is a nullity, and the so-called judgment a vain and void thing. *Hoagland v. Creed*, 81 Ill. 506.

A jury is selected in accordance with methods pointed out by law, the parties litigant aiding in such selection, and having various rights as to the making up of the panel.

As in the case of the person by whom, as judge, the trial was had and the judgment entered, so in the case of the jury, to whom the questions of fact appear, by the record, to have been submitted; if the record show upon its face that the cause was not submitted to, tried by, and a verdict rendered by the persons designated and selected as before men-

tioned, but by others, who by means of fraudulent and criminal practices obtained seats in the jury box, heard the evidence and rendered a verdict, having no right or authority to do so, the judgment, to say the least, is a thing which a court having power over the same, will not, as against the protest of a party innocent of the iniquity, allow to stand. *Dayton v. Church*, 7 Abb. N. C. 367; *People v. Ransom*, 7 Wend. 416; *Norman v. Beaumont*, Willis, 484; *King v. Tremain*, 7 Dowl. & Ryl. 684; *Dovey v. Hobson*, 6 Taunt. 460; *Stripling v. The State*, 3 S. E. Rep. 277; *Windett v. Hamilton*, 52 Ill. 180; *Steele v. People*, 40 Ill. 59; *Black on Judgments*, Sec. 310; *People v. Gary*, 105 Ill. 264.

A party has not only a right to a trial by jury, he has a right to a trial by, and a verdict from the jury selected to try the cause; the men by whom, sitting as jurors, he has every reason to, and does, believe, are actually passing upon his case.

Whether the verdict or judgment under consideration is, as between the parties, just or not, is a question which we are not now called upon to determine. It is sufficient to say that neither verdict nor judgment was rendered under such circumstances as the law contemplates; that the parties have not, in the view of the law, had their day in court; that the facts in controversy have not been determined in accordance with the law, or by such a jury as the parties have a right to be heard by.

If a verdict or a judgment is to be permitted to stand when one person has, by fraudulent and criminal means, succeeded in placing himself upon the jury, and participated in the verdict rendered, upon principle and logic a verdict and judgment where the entire panel was composed of persons there obtaining place by such methods, might be sustained. What the influence of the criminal who did sit and act with the jury was, we can not tell. The other eleven, or *the* eleven jurors (for Farrell was not a juror) were apparently bound to hear and consider what he had to say; he took part in their deliberations and exerted his influence in bringing about a verdict which, but for his participation therein, could not have been rendered.

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It is some satisfaction to know what the character of the man guilty of this criminal conduct was; that he had before been three times in prison; once in the penitentiary for highway robbery; but, had he been the most irreproachable man in the community, the effect of his misconduct in the present case would have been the same.

A verdict has not been rendered in this case by a jury of twelve men. Unknown to the parties, and without their consent, eleven jurors, alone, sat at the trial and joined in the verdict. By the fraudulent conduct of Michael Farrell, the parties were deprived, upon that occasion, of their right to a trial by jury. Such right, the constitution of this State guarantees to them, and in accordance with such right, and for the purpose of maintaining the same, the order of the Superior Court refusing to set aside the judgment and award a new trial in this cause, is reversed, and the cause remanded, with directions to the court to set aside its judgment and give the parties a new trial.

MR. JUSTICE GARY.

I do not wish to add to what Judge Waterman has written as to the effect of personating a juror, where there is nothing to put the party on his guard against it. Had it been made a question, while the jurors were being selected, whether one of them was the person he professed to be, I take it the result could not be overhauled except by direct proceedings reviewing some decision of the court upon exception duly taken. But as this case presents the matter, the question is, whether the objection could have been reached by writ of error *coram nobis* at common law, for which writ the statute has substituted a motion. Sec. 67 (bb), Ch. 110, Practice.

If it could not have been so reached, the court had no authority to grant the motion, as, in general, a court can not vacate a judgment after the term. That writ would lie whenever some fact not shown by the record, nor in issue, that is, not the subject of inquiry during the suit, which if known to the court, would have prevented the judgment, was made to appear by the error assigned upon that writ.

If the record shows the fact, or, in our practice, if the papers in the cause show the fact, then the error in disregarding the fact is not error in fact, but in law, and can be corrected by the same court only during the term. Graham's Practice, 942; 1 Tomlin's Law Dict., 652; 2 Tidd's Practice, 1136; 6 Am. & Eng. Ency. of Law, 810.

Though the personating a juror is not found among the instances where such writ has been the remedy, it seems to stand upon the same footing as an extrinsic fact, not shown by the record nor in issue, and therefore may be, under the statute, reached by motion.

67 286
169: 184

John A. Cook v. Sanitary District of Chicago.

1. LANDLORD AND TENANT--*Ownership of Fixtures*.—Where a tenant erected upon the demised premises certain buildings, structures and fixtures, and afterward took another lease for the same for five years, and which was extended twice after its expiration, each time for one year, without any reservation of the right to remove such buildings, structures and fixtures, *it was held*, in condemnation proceedings, that the buildings, structures and fixtures in question belonged to the landlord, and that he and not the tenant was entitled to compensation for the same.

Condemnation Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

ARTHUR B. WELLS, attorney for appellant.

W. M. McEWEN, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The question of law in this case is, to whom did the buildings, etc., upon certain premises condemned for the uses of the appellee, belong? The land itself was the property of the appellant, by devise from his father, as tenants

of whom the firm of A. S. Piper & Co. had held the land for several years before 1883, and during such tenancy had placed upon the land a large stable and hay barn, dwelling, corn crib, cowhouse, some fences, well, pump and drinking trough. No distinction is attempted here by either party, between the different things described. November 1, 1883, one of the firm, probably for the firm, took another lease for five years, which was extended twice after its expiration, each time for one year, which lease contained covenants:

“And as additional rents said Piper covenants and agrees, at his own expense, to keep in good repair the fences upon said demised premises. * * * And the said party of the second part further covenants with said party of the first part, that the said party of the second part has received said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned, or sooner determination thereof by forfeiture, he will yield up the said premises to said party of the first part in as good condition as when the same was entered upon by said party of the second part, loss by fire or inevitable accident or ordinary wear excepted; and also will keep the said premises in good repair during this lease at his own expense.”

The court below held that the buildings, etc., remained the property of A. S. Piper & Co., and that a conveyance from them to the appellee gave to it the right to the money awarded as compensation for such buildings, etc.

The brief of the appellee says:

“With the modification of the ancient English rule that everything attached by the tenant to the freehold becomes a part of it, has come a more liberal spirit in favor of the agriculturist or tradesman, permitting him to remove improvements when the same can be done without manifest injury to the land. That there are a number of decisions of courts holding that the making of a new lease without reservations, waives the right to remove the improvements, appellee does not dispute. On the other hand, there is abun-

dant authority recognizing the right to remove on any continuation of the tenancy," and relies mainly upon *Second National Bank v. Merrill Co.*, 69 Wis. 501, and *Kerr v. Kingsbury*, 39 Mich. 150; but even those cases are not authority that the property in such buildings, etc., remained in the Pipers after a new lease accepted, with such covenants as above quoted. The last case impliedly admits the contrary, by distinguishing it from *Thresher v. East London*, 2 B. & C. 608, where similar covenants were in the new lease.

Carlin v. Ritter, 68 Md. 478, contains a review of the authorities, and arrives at the same conclusion as this court held in *Leman v. Best*, 30 Ill. App. 323, that the tenant under a new lease did not retain the property, unless by arrangement with the landlord.

The estoppel claimed by the appellee, based upon statements of appellant's attorney, does not exist, as before the situation of the parties had changed, the appellee was informed that such statements were made under a mistake as to the facts.

The right to the money is with the appellant, and the judgment is reversed and the cause remanded with directions to award it to him. Reversed and remanded with directions.

Siegfried Neulander v. Louis Rothschild and Emil Deutsch.

1. NEW TRIAL—*Motion for—What Equivalent to.*—A motion to set aside a judgment and restore a cause to the calendar for trial is equivalent to a motion for a new trial, and such a motion having been overruled it is proper to strike another motion asking for a new trial from the files.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Neulander v. Rothschild.

Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

This is an action brought, originally, before a justice of the peace, by appellees against appellant, to recover the sum of \$184.80 on a guaranty said to have been given on appellees by appellant to insure appellees against loss by appellant's son, with whom appellees at that time had a contract to travel for them and sell their wares. Appellant's son proceeded to travel for appellees, reached Omaha, Nebraska, and from thence returned to Chicago, appellees having refused to send him any money. Appellees then demanded payment for the amounts they had advanced appellant's son, and brought suit against appellant upon his guaranty. Depositions of appellees were taken, they being residents of the city of New York, and on November 14, 1895, said justice of the peace gave judgment against appellant for \$184.80, from which judgment the appellant took an appeal to the Circuit Court of Cook County.

The case was then noticed by plaintiffs for the short cause calendar, and on February 24, 1896, a jury was called, impaneled, and after listening to plaintiff's depositions, rendered a verdict against defendant for the sum of \$184.80; thereupon the court at once entered judgment on the verdict.

On March 11, 1896, defendant's attorney filed a motion to set aside the judgment, and to restore the cause to the calendar for trial, which motion the court overruled.

On the 12th day of March, appellant filed with the clerk of the court a written motion for a new trial, which last mentioned motion the court ordered stricken from the files, and refused to allow defendant's attorney to argue same, and allowed the judgment to stand. The defendant thereupon took an appeal to this court.

S. M. FRIEDLANDER, attorney for appellant.

DUPEE, JUDAH, WILLARD & WOLF, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The judgment was entered at the February term. At the same term appellant's motion to set aside the judgment and restore the cause to the calendar for trial, was overruled; this motion was equivalent to a motion for a new trial. The court having overruled this motion, properly struck from the files another motion, the subject-matter of which it had previously passed upon.

From the order striking this motion from the files, appellant has appealed.

This was not an appeal from the judgment.

No appeal from the judgment has been taken. *Guyer v. Wilson*, 139 Ill. 392; *Quinn Chapel v. Pease*, 66 Ill. App. 552.

There is in the record nothing showing that the judgment ought to have been set aside or a new trial granted.

Perceiving no error in the record, the order of the Circuit Court striking appellant's motion for a new trial from the files, is affirmed.

James S. Paterson v. N. E. Whitney.

1. TRIALS—*Finding of Judge Conclusive*.—A finding by a judge trying a cause without a jury is as conclusive as a verdict of a jury, and being upon conflicting evidence, stands.

Assumpsit, upon special and common counts. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

GOODRICH, VINCENT & BRADLEY, attorneys for appellant.

JOHN C. TRAINOR, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We pass by what is said in the brief of the appellant as to prejudice of the judge below. It is not argument to us.

Knickerbocker v. McKindley Coal & Mining Co.

The assertions in the brief that one witness for the appellee "was not telling the truth;" another "was deliberately lying;" and that the testimony in favor of the appellant "is consistent, reasonable and honest;" are assertions of the truth of which we have no means of judging.

A finding by a judge trying a cause without a jury, is as conclusive as a verdict of a jury, and being upon conflicting evidence, stands. *Keating v. Springer*, 44 Ill. App. 547.

The residue of the argument relates to the sufficiency of, and variance of the evidence from the declaration, but as all the abstracts tells us of the declaration is that it consisted "of special counts and common counts," we omit consideration of the argument. *Chapman v. Chapman*, 129 Ill. 386; *Chicago, Peoria & St. Louis Ry. v. Wolf*, 137 Ill. 360; *Schmitt v. Devine*, 63 Ill. App. 289; *Klass v. John Kaufman Brg. Co.*, *Ibid.* 319; *Adams & Sons Co. v. Ellinger*, *Ibid.* 479.

The judgment appealed from is affirmed.

67	291
179	535

John J. Knickerbocker, George G. Newbury and Ellis L. Hagenbuck, Executors and Trustees of the last Will and Testament of James J. Gore, Deceased, v. McKindley Coal & Mining Company and Steele-Wedeles Company.

1. **RECEIVER—*The Hand of the Court.***—A receiver is the hand of the court. The court is an instrumentality resorted to by the parties for their convenience, and a receiver is an agent appointed by the court to serve the parties interested.

2. **SAME—*Expenses—When the Estate is Insufficient.***—While the estate in the receiver's hands is the primary fund out of which his proper expenses and compensation are to be paid, if the estate is insufficient or fails, the parties for whom the receiver is acting may be compelled to pay the expense incurred for their benefit.

Intervening Petition.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in

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this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

The controversy here is over the furniture in Gore's Hotel, which this court on January 28, 1895, held that appellants owned and were entitled to the possession of, by virtue of having purchased and paid for it at a foreclosure sale. That was on an appeal from the Superior Court in the case of Knickerbocker et al. v. Heffron, wherein the Superior Court had ordered its receiver to deliver possession of said property to appellants, and from which decretal order Heffron appealed. After that decretal order had been affirmed by this court (57 Ill. App. 336), and after appellants had obtained possession of the property from the receiver, the Superior Court, in the same case, decreed that appellants pay certain indebtedness incurred by the receiver while the appeal was pending here, and in default of making such payments, to restore the property to the receiver for the purpose of selling it over again to raise money with which to pay such indebtedness of the receiver.

The appeal now appealed from *inter alia* directed appellants, as the executors and trustees of the last will and testament of James J. Gore, deceased, within a specified time, to pay to each of the appellees, respectively, said sums of money, and in default thereof, to restore certain furniture and fixtures to the possession of the receiver in the cause of said appellants against said Patrick H. Heffron, pending on the chancery side of said court, and in which cause the appellees had intervened by their petition filed therein on July 6, 1895. The decree finds: "That on January 9, 1889, James J. Gore and Patrick H. Heffron were partners, and, as such, owned and conducted a hotel, known as Gore's European Fire Proof Hotel, in the city of Chicago; that on said day, said Gore filed the bill of complaint in this suit against said Heffron, and therein prayed for an accounting and a dissolution of said partnership; that on January 29, 1889, upon agreement of the parties to said suit, an order was entered herein, appointing one James H. Rice receiver

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of the partnership property, and by said order said receiver was directed to operate said hotel and continue said business; that thereupon said Rice qualified and entered upon the discharge of his duties as such receiver, and continued as such until on or about July 16, 1889, when he resigned, and thereupon, on motion of said Gore, one Nicholas D. Laughlin was appointed receiver of said partnership property, and by said order of appointment said Laughlin was directed to continue the conduct and operation of said hotel; that on or about October 22, 1891, the death of said Gore was suggested herein to the court, and thereupon an order was entered herein, substituting John J. Knickerbocker, George G. Newbury and Ellis Hagenbuck, executors and trustees under the last will and testament of said Gore, as complainants in this cause."

"The court further finds that prior to the filing of the bill of complaint in this suit, the said Gore and Hefron had become indebted, and in order to secure said indebtedness, had executed a trust deed, which covered, among other property, the furniture and fixtures in said hotel; that thereafter suit was commenced to foreclose said trust deed, and thereafter a decree of foreclosure was entered in said suit, and thereunder, on March 15, 1894, said hotel building was sold to the complainants for the sum of \$95,000. Said furniture and fixtures were sold to complainants in the suit for the sum of \$9,250. That thereafter said sale was confirmed, and on March 28, 1894, an order was entered in this cause, directing said receiver to turn said furniture and fixtures over to said complainants; that on the 3d of December, 1894, said receiver purchased and received from intervenor, the McKindley Coal and Mining Company, coal for use and consumption in the conduct of said hotel to the amount of \$737.83; that said coal was necessary to enable said receiver to conduct said hotel, and was so used by said receiver, and the purchase thereof was proper, and was authorized by and was in pursuance of the order appointing said receiver; that no part of said coal has been paid for, and that there is now due for said coal to said intervenor, the McKindley Coal and Mining

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Company, from said receiver, the sum of \$737.83, with legal interest thereon from and after December 3, 1894; that on December 3, 1894, said receiver purchased and received from intervenor, the Steele-Wedeles Company, groceries to the amount of \$212.38; that said groceries were necessary to enable said receiver to conduct said hotel, and were so used by said receiver, and the purchase was proper and was authorized by, and was in pursuance of the order appointing said receiver, and was in discharge of his duties as such; that no part of said groceries has been paid for, and there is now due to said intervenor, the Steele-Wedeles Company, for said groceries, from said receiver, the sum of \$212.38, together with legal interest thereon from and after December 3, 1894.

“The court further finds that said sums so found due from said receiver to said intervenors, became and were, and have since continued to be, a charge and lien upon said furniture and fixtures, under said lease to said receiver, and thereupon said complainants, John J. Knickerbocker, George G. Newbury and Ellis L. Hagenbuck, took said furniture and fixtures out of the possession of the receiver, and have since said date continued to withhold said property from said receiver.

“The court further finds that the receiver has no funds or property in his hands with which to pay said claims of said intervenors.”

It has been stipulated that the findings of fact in said decree shall be taken as uncontroverted.

JOHN S. COOPER, attorney for appellants.

MORAN, KRAUS & MAYER, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A receiver is the hand of the court. The court is an instrumentality resorted to by parties for their convenience. A receiver is, therefore, an agent appointed by the court to serve the parties interested.

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It follows that while the estate in the receiver's hands is the primary fund out of which his proper expenses and compensation are to be paid, if the estate be insufficient or fail, the parties for whom he has acted may be compelled to pay the expense incurred for their benefit. *City of St. Louis v. St. Louis Gas Light Co.*, 11 Mo. App. 237; affirmed, 87 Mo. 224; *Einstein v. Lewis*, 54 Ill. App. 520; *Myers v. Frankenthal*, 55 Ill. App. 390; *French v. Gifford*, 31 Ia. 428; *Johnson v. Garrett*, 23 Minn. 565; *Lammon v. Giles*, 3 Wash. Ter. 117-123; 20 Am. & Eng. Ency. of Law, 180.

If, as is contended by appellants, they, by the sale under the mortgage made by Gore and Heffron, acquired a title superior to that of the receiver, the case is then one in which the estate in the receiver's hands has been exhausted, leaving unpaid debts, properly incurred by him in the discharge of duties, undertaken for the benefit of the testator of appellants and Heffron.

Whose debts, in the view of a court of equity, are these obligations of the receiver, incurred in running a hotel belonging to the parties in whose interest the receiver was appointed and acting?

Clearly, the obligations of the estate of Gore and of Mr. Heffron.

The receiver is entitled to charge those items in his account, and to have them paid by those for whom he acted.

The conditional order to surrender the personal property may not have been proper, in view of the title acquired by appellants at the foreclosure sale, but such order, being conditional, does not injuriously affect appellants. Appellants might properly have been peremptorily ordered to pay the debts due appellee.

We do not wish to be understood as holding that appellants, by their purchase at the foreclosure sale, acquired a title superior to, and free of, the title which Gore and Heffron, subject to the receiver's claims, before had; as to this, we do not deem it necessary to express an opinion.

The decree of the Superior Court is affirmed.

**Siegel, Cooper & Company v. Henry Schueck et al., for
the use of E. A. Prior & Co.**

1. **DURESS—Of Servant by Master—Not Presumed.**—There is no such subjection or subserviency by a salaried employe, that the law will imply a transaction by him with his employer, to be voidable on the mere ground that perhaps he would be discharged if he did not assent. Before it can be held that an agreement between master and servant was made under duress the evidence must show that the servant exerted himself and resisted the compulsory influence.

2. **MISTAKE OF LAW—Not Ground for Disturbing a Settlement.**—A mere misapprehension of the law, where one so mistaken has full knowledge of the facts, is no ground for disturbing a settlement of a doubtful claim.

Transcript, from justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Reversed. Opinion filed December 14, 1896.

A. BINSWANGER, attorney for appellant.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action, begun originally before a justice of the peace and from there taken by appeal to the Circuit Court, was brought by the appellee against the appellant corporation to recover \$40 withheld from the salary of the appellee, who was a salesman in the employment of appellant.

In each court the appellee recovered the amount of his claim, and upon this appeal the question is baldly presented, whether any recovery by him can be sustained.

The circumstances out of which the claim of appellee arose, were briefly as follows:

A woman, known to the appellee, came to him in appellant's store one day after banking hours, and represented that she wished to make a small purchase and needed to

use, in so doing, her check on a bank for forty dollars. The appellee, having no authority to pass upon checks, accompanied her to the cashier of appellant, who, after making some inquiry of the appellee, "O K'd" the check and handed it back to the woman. She then went into another department of the store, bought a pair of shoes for \$2.50 and received them and \$37.50 in cash for the check.

The check was worthless.

So much, we understand, is not questioned. Concerning what was said by the cashier to the appellee and his reply, there is some difference, but it is not material to notice it, for it is quite plain that whatever was said, it was the cause of the cashier marking the check "O. K.," thereby enabling the woman to use it in the store as cash.

There is considerable contrariety in the versions of what took place between appellee and the cashier after the worthlessness of the check had been ascertained. But we will accept appellee's testimony upon the material part of such conversation, and what was done as a result of it. On his direct examination he testified :

"The cashier, Mr. Brennan, said, 'I guess you have got to pay it.' I said, 'I guess not.' It went on for a day or two and he said, 'You will have to get the woman arrested.' I said, 'No, it is your place.' He said, 'No, that Siegel, Cooper & Co. did not want to get mixed up in it.' I went and got a warrant to have her arrested, but she could not be found; she skipped the country. The amount of this check was deducted from my salary without my consent. Brennan told me he would charge it to me. I told him I would not pay it; I did not owe it. A couple of weeks after he said, 'I will make it easy for you, and will charge you \$2 a week.' I said, 'No, I would not do it at all.' The next week he deducted \$2 out of my salary, and kept on until the \$40 was paid. I was discharged a short time ago."

On cross-examination, appellee testified :

"I left the employ of Siegel, Cooper & Co., in August, 1895. This affair about this check occurred January 25,

1892. That was the date when the check was made and given. At that time I was employed in the furniture department. * * *

The second interview with Mr. Brennan by me took place in the latter part of the week, * * * and he said he would charge it to me. I said, 'No, you won't.' I then went up stairs. I never saw the check until I demanded it after it was paid; after it was taken out of my wages. I have kept it ever since.

After the warrant was made out I came back from the police station, and told him that Mandel had dropped the suit. Then he asked me if I had ever seen that woman. This was ten or fifteen days later, and I said, 'Yes, I saw her four years ago in Sweet's office as clerk.' I went with her the same as with any lady or gentleman that wants to pay by check.

I was paid every Tuesday, and worked on a salary of \$18 a week. After that I got more. After this check was presented by the woman I got my salary, minus \$2. I said nothing to Mr. Brennan. This went on from week to week, and I got my salary less \$2. This deduction of \$2 a week continued for twenty weeks.

Q. Did you ever ask for that \$40 after this money was kept out, after you were discharged? Did you ever go back after it?

A. No, sir; I never went and demanded it."

At the conclusion of the evidence, the defendant asked the court to instruct the jury that under the evidence and the law, the plaintiff was not entitled to recover, which the court refused to do.

We think it was error by the court to refuse to give the instruction.

Here, the appellee, though not expressly assenting, in terms, to the withholding from his salary of two dollars every week for a period of twenty weeks, in no manner dissented from it being done, except by saying, "I guess not," or, "No, you won't," in response to the cashier's statement that he should withhold it from his salary, and

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by saying that he would not pay it at all, in response to the cashier's statement that he would make it easy for him and take it out in such weekly installments.

There was no sufficient element of duress in the transaction to avoid it. *Lamson v. Boyden*, 57 Ill. App. 232.

We are not prepared to hold that there is any such subjection or subserviency by a salaried employe in a mercantile establishment, as that the law will imply a transaction by him with his employer to be voidable on the mere ground that perhaps he would be discharged from his employment if he did not assent to whatever might be demanded of him. In this case there was no evidence of threats made by the employer, or by the cashier, or of fear by the appellee, and we certainly will not imply a disastrous result where there was no evidence that the cashier possessed any authority either of discharge or of employment, and where no appeal was made or attempted to be made to the appellant, appellee's employer. There is no evidence that the cashier was in any sense the superior of the appellee in employment, and it would be to carry the doctrine of coercion or duress beyond any limits we have any knowledge of, to apply the doctrine applicable in cases of duress or coercion, to a case like this.

Before we could consider whether an agreement made under duress of wages, or employment, might be avoided, it would have to appear affirmatively that the person thus circumstanced had exerted himself and resisted the compulsory influence, whatever it was. *Spaids v. Barrett*, 57 Ill. 289 (p. 292).

But here we discover nothing of the kind; not even an appeal to the employer or to one empowered to act for him. On the other hand, there is absolutely tame submission, not even amounting to protest, except by a dissent from the proposed action in advance of its being taken, for not alone the twenty weeks required in which to make up the lost sum, but for more than three years after the sum had been thus made good.

If it be said that the appellee permitted the two dollars a

week to be withheld under a mistaken apprehension as to his legal liability to make good the sum lost, that is no excuse.

A mere misapprehension of the law, where one so mistaken has full knowledge of the facts, is no ground for disturbing a settlement of a doubtful claim. *Percy v. Hollister*, 66 Ill. App. 594.

It is argued by appellee that his promise, if one were made, was void, because not in writing. We can not, under the facts of the case, assume that this was a promise by appellee to pay the debt of another, but if it were, we know of no authority which permits one who has verbally promised to pay the debt of another, and has in pursuance of such promise gone on and paid it, to recover back money so paid, and we have no hesitation in saying that he could not.

Under the facts of the case, we hold that no recovery can be had, and the judgment of the Circuit Court is reversed, without remanding the cause.

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Eric Anderson v. The South Chicago Brewing Co. et al.

1. CHATTEL MORTGAGES—*Sale of Mortgaged Goods Without Written Consent*.—It being a crime punishable by imprisonment for a mortgagor, without the written consent of the mortgagee, to sell the mortgaged property, the court is of the opinion that an offer on the trial to show a verbal consent to such sale, was properly refused.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

On August 26, 1892, Charles Gustafson gave to the Merle & Heaney Manufacturing Company his twenty-seven notes, amounting to \$632, and to secure the same gave a chattel mortgage on certain saloon fixtures at or before that time purchased from said company, and placed in his saloon at

Anderson v. South Chicago Brewing Co.

6934 Stony Island avenue. Twenty-five of said notes were for \$25 each, and payable one every month. The notes were paid as they became due until nine notes had been paid, the tenth note falling due June 26, 1893.

About June 13, 1893, Gustafson made a sale to Eric Anderson, appellant herein, of all his goods and chattels at said saloon, including the mortgaged property. (An offer was made during the trial to show that Gustafson obtained from the Merle & Heaney Manufacturing Company its verbal consent that he might make such sale before the sale was made, and while said company still owned the notes and mortgage, but the court refused to admit such evidence.)

Immediately upon the sale to Anderson the saloon was closed, and was never again opened for business. On or about June 17, 1893, the South Chicago Brewing Company, hearing that the saloon was closed, entered a judgment of confession against said Gustafson on a judgment note dated November 30, 1892, for \$419. After June 13, and on or before June 21, 1893, the Merle & Heaney Manufacturing Company transferred Gustafson's notes and mortgage to the Garden City Banking and Trust Company; and on June 21, 1893, the South Chicago Brewing Company purchased said notes and mortgage from the bank, paying therefor the face of the notes with accrued interest. Immediately upon obtaining possession of said notes and mortgage, the brewing company, through its secretary, Mr. Lederer, placed said mortgage in the hands of Constable Murphy, with instructions to foreclose at once. Said constable went direct to said saloon and took possession of the mortgaged goods, and posted notices of a sale, giving as a cause of foreclosure, that the mortgagee "felt unsafe and insecure and feared a waste of said property." On June 23d following, the sheriff levied under the execution issued in confession of judgment against Gustafson, and on June 30, 1892, Eric Anderson sued out the replevin writ herein.

The declaration has three counts :

First. A taking and wrongful detaining.

Second. A wrongful detention.

Third. Plaintiff lost said goods, defendant found them, and refused to deliver them.

The defendants' plea :

First. *Non cepit* and *non detinet* to whole declaration.

Second. *Non cepit* to first count.

Third. *Non detinet* to second count.

Fourth. Property in South Chicago Brewing Co.

The court instructed the jury to find for the defendants, holding plaintiff's title to be subject to the mortgage, and that the sale to the plaintiff gave, under the terms of the mortgage, the right to foreclose.

EDWARD OWINGS TOWNE and JAMES H. STANSFIELD, attorneys for appellant.

ALLAN C. STORY, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 7 of Chapter 95 of the Revised Statutes, entitled mortgages, is as follows :

“ Any person having so conveyed any personal property who shall, during the existence of such title or lien, sell, transfer, conceal, take, drive or carry away, or in any manner dispose of such property, or any part thereof, or cause or suffer the same to be done, without the written consent of the holder of such incumbrance, shall be guilty of a misdemeanor, and on conviction may be fined in a sum not exceeding twice the value of the property so sold or disposed of, or confined in the county jail not exceeding one year, or both, at the discretion of the court.”

It being a crime punishable by imprisonment for a mortgagor to, without the written consent of the mortgagee, sell the mortgaged property, we are of the opinion that the court properly refused appellant's offer to show a verbal consent by the mortgagee to the sale.

The statute, a part of the chapter concerning “ Mortgages,” was undoubtedly designed as a protection to mort-

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gagees, and to relieve them from being compelled, in case of sale, to meet the assertion of the mortgagor, that verbal consent to a sale had been given.

The judgment of the Circuit Court is affirmed.

MR. PRESIDING JUSTICE SHEPARD :

I do not concur in the construction of the statute referred to.

Andrews & Johnson Company v. Frederick M. Atwood
et al.

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167 249
67 303
170 432

Fitz E. Culver v. Frederick M. Atwood et al.

1. **CONTRACTS**—*What Law is a Part of.*—The law in force at the time a contract is made which bears upon the liabilities incurred by the parties, either fixed or contingent, is, in contemplation of law, a part of the contract.

2. **MECHANIC'S LIENS**—*Application of Act Giving a Lien to Sub-subcontractor.*—The statute giving a mechanic's lien to sub-subcontractors does not apply to cases where the original contract was made before the passage of the statute, although the sub-subcontract was made after such passage.

Mechanic's Lien.—Appeals from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

CARLOS S. ANDREWS, attorney for Andrews & Johnson Co., appellants.

ARND & ARND, attorneys for Fitz E. Culver, appellant.

MARSTON, AUGUR & TUTTLE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The main question is the same in each of these cases.

May 27, 1895, Atwood contracted with the George A. Fuller Company to erect—complete—a large building.

June 10, 1895, the latter sub-let the heating apparatus to the Charles H. Simmons Company, and that company sub-let to the appellants portions thereof, part to one and part to the other, after the act to revise the law in relation to mechanic's liens, approved and in force June 26, 1895, went into effect.

Under such sub-subcontracts, the appellants did the work for which, by their petitions herein, they claim liens upon the building and premises.

That sub-subcontractors had no lien under the law as it had always been before the last act, is undisputed. *Cairo & St. Louis R. R. v. Watson*, 85 Ill. 531.

Under the present law they have such lien, and the appellants claim that, as their contracts were made and performed since that law came into force, they are entitled to the benefit of it, as a law relating only to remedy. It can hardly be contended that so far as relates to the owner, a part of the new law is in force and a part not. If the whole effect of the law were merely in the nature of a garnishment of funds in his hands, as to which funds he would, in legal contemplation, be indifferent whether one or another should have them, there would be more ground for the position that the law relates only to remedy; but not only does it charge with a lien his property, which creates a right to be enforced by the provisions for a remedy, but it lays upon him the performance of acts, or sufferance of the consequences, which acts were not required by former laws. Under section 5 it is made his duty to require of the contractor "a statement in writing, under oath or verified by affidavit," of many things, and under section 22, consequences follow if he does not make "written protest" against things there mentioned. Now, when Atwood let the contract to the George A. Fuller Company, the law then in force as to the liabilities they respectively incurred, fixed or contingent, as consequences of that contract, were, in contemplation of law, part of the contract. *Von Hoffman v. City of Quincy*, 4 Wal. 535, 550.

The legislature could not have intended to do what it

Ayers v. Bintliff.

could not do, viz., add to, or take from, the sum of what each party to the contract was to do, to be entitled to all the benefit that party was to have from the contract by its terms.

The George A. Fuller Company could impose upon Atwood the burden of protecting himself as to sub-contractor Charles H. Simmons Company, because the then law permitted such imposition; but the latter company could not impose upon Atwood the further burden of protecting himself against sub-subs, because all the burdens of Atwood are legal consequences of his contract with George A. Fuller Company, and when that contract was made, the law did not permit such imposition.

The decrees dismissing the petition are affirmed.

George L. Ayers et al. v. Mary L. Bintliff et al.

1. **CONFESSION OF ERRORS**—*Where None Are Assigned.*—Where no errors have been assigned none can be confessed.

Interlocutory Order, appointing a receiver. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Appeal dismissed. Opinion filed October 19, 1896.

WILLIAM J. LAVERY, attorney for appellants.

No appearance for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

July 21, 1896, in the Superior Court, an interlocutory decree was entered, among other things appointing a receiver, from which the appellants perfected an appeal by filing a bond the next day.

The last day for filing the record here was September 19, 1896. (Act of 1877, concerning appeal from interlocutory orders.)

October 7, 1896, the appellants filed here a transcript of the decree and appeal bond, and later in the same day the appellees filed here a transcript of the whole record of the case. October 8, 1896, the appellants moved to dismiss the appeal, which was done, and the appellees now move to set that dismissal aside, and for leave to confess errors, and that the court shall reverse the decree and direct the Superior Court to dismiss the bill. As the appellants have not assigned any errors, none can be confessed, and as the appeal was not perfected in this court within sixty days after the decree was entered, this court has no jurisdiction to do anything in it, but dismiss it. *Schillo v. Anderson*, 51 Ill. App. 403.

There is, therefore, no reason to set aside the dismissal already made, and that exhausts the power of the court.

No costs are awarded to either party.

The People of the State of Illinois v. James Goggin.

1. **MANDAMUS**—*Power of the Court Over.*—After an alternative writ of mandamus was issued and served, this court, upon examination of the record, refused the peremptory writ and dismissed the petition.

Petition for Mandamus.—Original proceedings. Heard at the October term, 1896. Petition dismissed.

BULKLEY, GRAY & MORE, attorneys for petitioner.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a petition on the relation of Sophia J. Shattuck for a mandamus upon the defendant, a judge of the Superior Court of Cook County, requiring him to sign a bill of exceptions in a case lately—it is said—tried before him, wherein James Babcock, and others named, were plaintiffs and the relator was the defendant. To give this court jurisdiction, the petitioner avers that she has sued out a writ of error for the purpose of reversing the judgment against her in that case, “and that it is necessary in order

Arentz v. Reilly.

to properly present said cause for review in this court that "she "should have a bill of exceptions."

The alternative writ has been issued and served upon the defendant, and no answer made. Now the relator asks for a peremptory writ.

Before issuing it, we deemed it best to see for ourselves whether the record of this court justified what is said about it in the petition.

We find that, October 5, 1896, the relator filed here a praecipe asking the clerk of this court to issue a writ of error and a *scire facias* in a case of herself against the said Babcock and others; that no writ of error has been taken out; that a *scire facias* was issued October 7, 1896; that no record from the Superior Court has been filed.

October 6, 1896, the day after the praecipe was filed, and the day before the *scire facias* was issued, this petition was filed. We can not tell, in the absence of any record from the Superior Court, whether such a bill of exceptions as the relator desires would have any reference to the case in which she has filed a praecipe.

Whether it would have any such reference is a matter for judicial determination—not of averment by the relator. Our jurisdiction depends upon it. *People v. Hawes*, 124 Ill. 569.

The case in which she filed a praecipe may have been ejectment or replevin, so far as anything in this court shows, while she wants a bill of exceptions in an action of assumpsit. Perhaps she will never bring a record.

The alternative writ was issued without jurisdiction, and the case is dismissed.

May Arentz et al. v. George Reilly et al.

1. DECREES—*Personal and Alternative*.—A decree which directs that if the money provided for shall not be paid within the time limited, then the premises involved be sold, is not a personal decree for the payment of money against the defendant, but is an alternative decree.

67	307
66	532
67	307
86	182
67	307
104	1159

2. DAMAGES—*On Dismissal of Appeals—Short Record.*—Where a short record does not show whether there was or was not good ground for an appeal, the court can not determine whether damages for delay should be awarded under section 23 of chapter 33, R. S., entitled, "Costs," and such damages are denied.

Mechanic's Liens.—Motion for damages on dismissal of an appeal in this court. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Motion denied. Opinion filed November 5, 1896.

ALBERT N. EASTMAN, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This appeal has been dismissed upon a "short record," and the appellees ask that damages be awarded.

The case is, that a decree was entered that the "defendants (appellants) pay" the amounts adjudged in favor of the appellees in a proceeding to enforce mechanic's liens, and "in default of said judgment being made," the property involved should be sold. The appellees urge that this is a money decree, and for that reason to be distinguished from *Hamburger v. Glover*, 157 Ill. 521, which was an appeal by parties claiming a mechanic's lien, from a decree dismissing their petition and foreclosing a mortgage, but not directing them to pay anything.

So much of the present decree as directs the appellants to pay, would, if the decree were construed to be a personal decree, be erroneous. Cases cited in *Sprague v. Green*, 18 Ill. App. 476.

But such decrees are construed as being, not decrees against persons, but alternative, "that if the money should not be paid within the time limited, then the premises should be sold." *Kirby v. Runals*, 140 Ill. 289.

It was therefore not a decree "for the recovery of money against the appellant," and is governed by the case first cited.

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If a complete record were here, we might determine whether damages for delay should be awarded under section 23, chapter 33 of the statute, but a short record does not show whether there was, or was not, good ground for appeal.

The damages asked are denied.

Reuben R. Freeman, Executor of W. A. Koontz, v. A. W. Walker.

67	309
71	316
67	309
894	358
67	309
110	405
67	309
8209s	20

1. LIMITATIONS—*New Promise may be Implied.*—In order to take a case out of the statute of limitations there must be a promise to pay the debt, but such promise may be implied from an unqualified admission that the debt is due and unpaid.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

This was a suit on a promissory note, brought by W. A. Koontz against A. W. Walker. The declaration consisted of the common counts, together with a special count describing the note sued on, a copy of which attached to the declaration, is as follows:

“\$1,199 25-100.

SHELBYVILLE, ILLS., March 15th, 1883.

One day after date I promise to pay to the order of W. A. Koontz, eleven hundred ninety-nine and 25-100 dollars, for value received, with interest at the rate of eight per cent per annum from date. Payable at the bank of W. P. Thornton & Son.

A. W. WALKER.”

To the declaration a plea of the statute of limitations was interposed by the appellee.

To the plea of the statute of limitations, two replications were filed by the appellant. One of the replications alleged that prior to the lapse of ten years from the date the cause of action accrued the appellee made a new promise in writing, whereby he acknowledged and promised to pay the note. The other replication alleged that after the lapse of ten years from the date the cause of action accrued, the appellee made a new promise in writing, whereby he acknowledged and promised to pay the note.

To these replications issues were joined, and a trial was had on June 22, 1896. After the evidence of the appellant was introduced, the court refused all instructions offered on behalf of the appellant, and instructed the jury to find its verdict for the appellee; and after overruling appellant's motion for a new trial, entered judgment on the verdict, from which judgment this appeal is prosecuted.

While the case was pending in the Circuit Court, and before trial, the plaintiff died, and his death being suggested on the record, it was ordered that the cause proceed in the name of Reuben R. Freeman, executor of the last will and testament of W. A. Koontz, deceased.

On the trial of the case, the note in question was allowed to go in evidence to the jury upon the promise of counsel for appellant to the court, that he expected to prove that after the statute of limitations had begun to run, there was a promise to pay the note. The appellant then offered in evidence the following letters:

" LA GRANGE, ILLS., Feb. 2, 1890.

John M. Stroup, Esq., Sedalia, Ohio.

DEAR SIR: Yours of the 16th inst. received, and in reply desire two things of you: First, I can't remember that I owed you any balance. If I could find my books, in which was an itemized account of all my transactions with Mr. Koontz and yourself, I could understand it probably. So, please explain all about this bal. being \$78 10-100, with interest, and be assured that I will pay it if I understand it, just as fast as I can.

Second: Please give me the principal of the note Mr.

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Koontz holds against me, date, per cent and when it was due. Please state these particularly. I had hoped to begin paying interest at least on his note, but now that I have yours to pay, I will have to delay his. Let me hear soon.

Yours, etc.,

A. W. WALKER."

"LAGRANGE, ILL., Jan'y 31st, 1891.

John M. Stroup, Esq., Sedalia, Ohio.

DEAR SIR: I have been expecting to write you for some time concerning my indebtedness to Mr. Koontz, and have only delayed because I have not seen my way clear to pay even the interest on note, and keep along with the expenses of my little family, living being very high in Chicago and suburbs.

I did write you a long while ago, wishing to renew my note, giving new note for principal and interest, less a fair remuneration for looking after rents, and the farms generally.

I now write you, friend Stroup, and ask you to arrange the matter with Mr. Koontz, as he is getting old, and such matters, I presume, annoy him. I will pay every cent I owe him, if I live, but I must have time. I now can see my way clear to pay at least the interest for next year, and possibly some on the principal, if I am not disappointed in my school prospects for next year. Since leaving Windsor I have relied on my own resources, and have only been able to keep up current expenses, having to compete with old men teachers, and my salary in consequence being small. But my prospects are brightening, and I want to arrange to meet my note just as fast as I can. Had I not been disappointed in my expectations with father, I would have met this note before, but as it is, I must pay along now just as I can save from my salary. Father and I, however, are not estranged.

Now, this is what I want to do, and want you to get Mr. Koontz to do. I want to give a new note for amount due 1st February, having five years to pay it in, bearing seven per cent interest, I agreeing to pay interest annually, and

as much on note as I can. I feel that by that time I can pay it off. Now let the new note include principal of old note and interest up to February 1, 1891, less amount due me for looking after matters. Do you think \$50 a year is unreasonable? I have an account of all moneys received and paid out, kept at the time, but can not come upon it yet, but I am sure it is in my papers somewhere. But you remember we settled up in the spring of 1883 some time.

Do urge upon Mr. Koontz not to feel that I have, through choice, delayed making any provisions to meet my note; nothing will please me better than to be able to meet his note against me, as I hope to, but I have had a pretty hard time, but I'll come out all right.

Write me soon. Remember me kindly to Mrs. Koontz and your wife, and believe me,

Yours very truly,

A. W. WALKER."

These letters were written by the appellee to John M. Stroup, who was acting as agent for Mr. Koontz, and it was admitted by appellee's counsel that Mr. Stroup was acting in that capacity.

To the introduction of these letters the court sustained an objection, and appellant duly excepted.

The following letters of appellee were then offered in evidence by appellant, and the court sustained objections of appellee to each of them, the appellant duly excepting thereto.

"COOK COUNTY, ILLS., Mar. 18, 1892.

MY DEAR MR. KOONTZ:

Yours of recent date forwarded to me, and I am sorry and even mortified not to be able now, and long before, to settle up matters with you. I have been teaching for the last few years, but, live as economically as we can, I don't get ahead any yet, but I do hope to get an increased salary in the course of a year or eighteen months, if not greatly disappointed. I had hoped all the time to get an advanced salary so as to begin paying on note, but I have not been able to do so.

Mr. Stroup claimed that I was back in our settlement

Freeman v. Walker.

which you gave him, and while I could not remember anything about it clearly, yet on his statement, I borrowed the amount of a fellow teacher and sent him by draft. Do you know whether he received it? If so, tell him to send my note.

It is my purpose to begin paying you off as soon as I can, and as soon as I get this borrowed money paid back, I will put my first savings toward paying you. I do trust you will not be greatly grieved by being kept out of payment so long, but it is all that I can do now.

Let me hear from you soon here at Lyons. Give my regards to your wife. Father is quite well now, and enjoys himself.

Respectfully,

AMOS WALKER."

"LA GRANGE, ILLINOIS, March 18, 1895.

W. A. Koontz, Esq., Sedalia P. O., O.

DEAR SIR: Your favor of 14th inst. rec'd and in reply can assure you that nothing would so satisfy me as to meet you and your wife and honestly and frankly talk over matters and explain my situation fully—for I can not write it. I have had a hard struggle, but I am sure to make a success yet, when I'll be able to square myself with the world, but I'm not able yet.

I have been thinking of coming to see you and your wife in order to explain my situation to you both, in a full and satisfactory manner, and as you are intending to visit father this summer, write me when you will be there, and I will try and arrange to visit him at the same time, when I will explain to you my exact situation. I think if you and your wife knew all, you would not feel hard toward me.

Father is confined to the house now, but we hope he may soon be able to be out again.

I learned of the death of Mrs. Stroup, and you and your wife have, and had then, my truest sympathies—but we must take comfort and feel that so noble a girl and daughter as she was here, is there a white-robed saint, and awaits the coming of her dear ones.

Remember me kindly to your wife, and tell her for me

that I hope to see you both soon. Write me whenever you can. We have two boys, one eleven years, the other some two years old. We all enjoy good health.

So hoping to hear from you whenever convenient,

I am, yours very truly,

A. W. WALKER."

It was admitted by appellee that the above letters were written to W. A. Koontz by appellee, and that the note and indebtedness referred to in all of the above letters are the note and indebtedness upon which this suit is founded, and described in the first count of the declaration.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant.

JOHN H. BRADLEY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Cases within the reason, but not within the words, of the statute of limitations, are not barred. *Bedell v. Jenney*, 4 Gil. 193.

In order to take a case out of the statute of limitations, there must be a promise to pay the debt, but such promise may be implied from an unqualified admission that the debt is due and unpaid. *Ayers v. Richards*, 12 Ill. 146; *Parsons v. C. I. C. & I. Co. of La Salle*, 38 Ill. 430; *Norton v. Colby*, 52 Ill. 198; *Carroll v. Forsythe*, 69 Ill. 127; *Homer v. Starkey*, 27 Ill. 13; *Sennott v. Homer*, 30 Ill. 429; *Wooters v. King*, 54 Ill. 343; *Hayward v. Gunn*, 4 Ill. App. 161.

The letter written by appellee, February 2, 1890, is an unqualified acknowledgment of the debt represented by appellant's note, and an intention to pay the same; so too, is the letter written March 18, 1892. That the note in suit is the note mentioned in each of these letters, was admitted upon the trial of the cause.

The letters offered in evidence should have been admitted.

The judgment of the Circuit Court is reversed, and the cause remanded.

Underwood v. Masterson.

Charles D. Underwood v. E. F. Masterson et al.

87	815
67	160

1. **BILLS OF EXCEPTIONS—Orders Extending Time to File.**—An order to extend the time to file a bill of exceptions without notice to the opposite party is ineffectual.

2. **SAME—Filing of, Nunc Pro Tunc.**—An order made at a subsequent term allowing a bill of exceptions to be filed *nunc pro tunc* is a nullity.

2. **PRESUMPTIONS—Where Notice is Required.**—Where the service of notice is jurisdictional such service will not be presumed.

Order, extending time to file a bill of exceptions. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court on a motion to strike the bill of exceptions from the files, at the October term, 1896. Motion allowed. Opinion filed November 5, 1896.

F. W. COOMBS, attorney for appellant.

MASTERSON & HAFT, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

April 25, 1896, the appeal was granted herein with leave to file a bill of exceptions within thirty days. July 28, 1896, the bill was filed *nunc pro tunc*, as of June 22, 1896. Whether we ought to assume that there was good reason for the *nunc pro tunc*, we will not consider, as the *tunc* was nearly a month too late.

It is attempted to justify the delay by an order of the court, entered May 22, 1896, extending the time thirty days. If that order was entered without notice, Ry. Pass. & Frt. Cond. Ben. Assn. v. Leonard, 62 Ill. App. 477, is in point, that it was ineffectual; and notice being jurisdictional, Morgan v. Campbell, 54 Ill. App. 242, is in point that it will not be presumed.

There is nothing before us from which notice can be inferred, and therefore, on motion of the appellees, the bill of exceptions is stricken out of the record.

Northwestern Brewing Co. et al. v. Margaret Manion.

1. **APPEALS**—*From Orders Dissolving Injunction.*—An appeal does not lie from an order dissolving an injunction unless the injunction is the only relief sought, or there has been a final decree entered disposing of the bill.

2. **INJUNCTION**—*Continuance on Appeal.*—The Appellate Court will not continue an injunction on an appeal where it has no jurisdiction of the appeal.

Bill, for injunction. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Motion to continue an injunction denied. Opinion filed October 7, 1896.

LACKNER & BUTZ, attorneys for appellants.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants filed, in the Circuit Court, a bill of interpleader, and obtained an interlocutory injunction, which that court afterward dissolved.

From the order dissolving the injunction this appeal was prayed and allowed.

No final decree disposing of the bill has been made; the suit is still pending in the Circuit Court.

From an order dissolving an injunction no appeal lies, unless an injunction be the only relief sought by the bill. *Cors v. Tompkins*, 46 Ill. App. 322; *Clabby v. Sheldon*, 47 Ill. App. 166; *Brown v. American Stone Press Brick Mfg. Co.*, 54 Ill. App. 647.

The ultimate relief sought by this bill is that Stone & Co. and the appellee shall interplead, so that the appellants may safely pay rent to one or the other, and the injunction was to prevent both of them from molesting the appellants in the meantime. The injunction was merely auxiliary, to preserve the *statu quo*.

Springer v. Merchants Nat. Bank.

We are now asked to continue the injunction under the provisions of Sec. 21, Ch. 69, R. S.

Having no jurisdiction of the appeal, we could not continue the injunction, even if there were ground for it. But as we read the record, there is no such ground. Stone & Co. have no interest in the premises; only a contract with Manion for an agency for her. If she breaks her contract, their redress, if any, is against her.

Payment to her will be a good defense to any proceeding against the appellants, as such proceedings can be only in her name, and for her own use. Nothing operating as an assignment of the rent to Stone & Co. appears in the record.

The motion to continue the injunction is denied.

Warren Springer v. Merchants National Bank.

1. *APPEAL—Right of, not Waived by Payment of Judgment.*—Payment of a judgment by the judgment debtor, he being induced to do so by a business necessity to relieve his real estate from the lien of the judgment, is not a waiver of his right to prosecute his appeal previously taken.

2. *SAME—Power of Courts Over, After the Expiration of the Term.*—A court has no authority to vacate an order allowing an appeal, except by the consent of the parties, after the expiration of the term at which such order is made.

Appeal from the Superior Court of Cook County. Heard in this court at the October term, 1896, on a motion to dismiss the appeal with damages. Motion sustained and damages awarded. Opinion filed October 19, 1896.

W. N. GEMMILL, attorney for appellant.

FRANK P. LEFFINGWELL, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

February 29, 1896, the appellee recovered in the Superior Court a judgment against the appellant of \$4,884.24, from which this appeal was perfected March 18, 1896.

August 18, 1896, without—so far as the record shows—any notice to the appellee, the appellant paid into court (as the order says for the sole use of the appellee) the amount of the judgment, interest and costs, and thereupon the court ordered that the appeal “be vacated and set aside, said judgment be satisfied, and the same is satisfied accordingly.”

September 2, 1896, the record recites (there is no bill of exceptions) that the motion of the appellee to vacate the order of August 18th, was denied.

No record was filed here until the 9th day of this term, which was seven days too late. Sec. 73, Ch. 110 R. S.

The appellee now moves to dismiss the appeal with statutory damages, which motion is resisted by the appellant.

The payment by the appellant of the judgment—he being induced so to do by a business necessity to relieve his real estate from the lien of the judgment—did not waive his right to prosecute his appeal. 2 Ency. Pl. & Pr., 181.

Had the appellee accepted the money, it might have been a waiver of any claim for damages. Ruckman v. Alwood, 44 Ill. 183.

But being in the court, was no such acceptance. Ibid.

The order of the court vacating the appeal was a nullity. The court had no jurisdiction. All control over the case by that court had ceased. If the court could vacate the appeal—except by consent (Humphreyville v. Culver, 73 Ill. 485), it might do so at the instance of either party, and for any reason that commended itself to the court; and there might be appeals vacated on application of the appellee, because he could probably get his money sooner by execution at once, than after the decision of a higher court; or because the court was sure that the judgment would be affirmed, and therefore the appeal was vexatious.

The motion of the appellee to dismiss is therefore sustained, with \$249.21 awarded as damages and costs against the appellant.

Blythe v. Small.

Charles A. Blythe and Cecelia A. Blythe v. G. Small.

1. **EQUITY—*Usurious Mortgages.***—On a bill filed to foreclose a usurious mortgage, claiming to recover the usurious interest, upon payment into court of all that the mortgagee is entitled to, the bill should be dismissed at the mortgagee's costs.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed November 11, 1896.

EDWARD ROBY, attorney for appellants.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The facts of this case seem to be that July 9, 1895, the appellants borrowed of the appellee \$40, and gave seven small notes, amounting in all to \$57, falling due at intervals—the last one, of \$7, January 2, 1896. The appellee filed this bill January 21, 1896, to foreclose a chattel mortgage securing the notes given to him by the appellants upon all their household goods, claiming \$34 as due and unpaid on the mortgage, and \$15 attorney fees, provided for in the mortgage. The appellants had paid \$23, and March 13, 1896, paid into court \$20 more for the appellee.

Under the statute, the appellee had no right to more than \$17. Sec. 6, Ch. 74, R. S.

On a bill filed to foreclose a usurious mortgage, claiming to recover the usurious interest, upon payment into court of all that the mortgagee is entitled to, and more, the bill should be dismissed at his costs.

The decree appealed from charges the appellants with \$20 balance due, the costs of suit, and \$88 custodian fees, with no facts in the record justifying the custodian fees, even if the appellants could be charged with them. Rick-

etts v. Chicago Per. Bldg. Assn., 67 Ill. App. 71; Adair v. Adair, 54 Ill. App. 502.

The finding in the decree that there is due from the appellants to the appellee \$88 custodian fees, is but the finding of a conclusion (McGeoch v. Hooker, 11 Ill. App. 649), and a wrong conclusion at that, for the appellants should be charged with nothing but the unpaid portion of the principal sum loaned.

The decree is reversed and the cause remanded, with directions that, if the facts be as herein surmised, the bill be dismissed at appellee's costs.

The appellants recover their costs in this court.

The People ex rel. Minnie Domres v. Gustav Weiss.

Louis Waterloo v. The People ex rel. Annie Schreiber.

1. **BASTARDY**—*Examination before Justice—Appeals and Further Arrests.*—No appeal lies from a judgment of a justice of the peace discharging the reputed father of an illegitimate child from an arrest made on a warrant for bastardy, and such a discharge is not a bar to another arrest for the same offense.

Bastardy.—Appeals from the Criminal Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding in *The People ex rel. Domres v. Gustav Weiss*; the Hon. ABNER SMITH, Judge, presiding in *Louis Waterloo v. The People ex rel. Schreiber*. Heard in this court at the October term, 1896. *The People ex rel. Domres v. Gustav Weiss* reversed and remanded. *Louis Waterloo v. The People ex rel. Schreiber* affirmed. Opinion filed November 19, 1896.

W. F. STRUCKMANN, Assistant County Attorney, for *The People ex rel. Domres*, appellant, and *The People ex rel. Schreiber*, appellee, maintained that the proceeding in bastardy is a purely statutory proceeding; it is not a suit at common law, neither is it criminal. *Lee v. The People*, 140 Ill. 536.

The action is not *ex contractu*, nor does the foundation of

The People v. Weiss.

the right of recovery bear any resemblance to a penalty. The object is not to punish for immorality or vice, or to impose a penalty for an unlawful act, but to provide a remedy for the enforcement of a legal obligation to support and maintain the bastard child. The procedure relates to the remedy and not to the cause of action. *Sharf v. The People*, 134 Ill. 240.

CHARLES H. RIPLEY, attorney for Louis Waterloo, appellant.

J. H. FRENDETHAL, attorney for Gustav Weiss, appellee, contended that when the defendant is discharged by a justice of the peace, the plaintiff's step is to appeal. *State ex rel. Dilworth v. Braun and others*, 31 Wis. 600; *Galvin v. State*, 56 Ind. 51.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

These two causes submitted here by stipulation of counsel upon briefs filed in but one of them, present the same question.

Both are prosecutions for bastardy, under the provisions of the statute.

In each of them the reputed father of the bastard child was arrested by warrant, and upon an examination being had before a justice of the peace was discharged and the case dismissed. Thereafterward, upon complaint by the relator in each case, made before a different justice, the said reputed father in each case was held to the Criminal Court.

In that court, what was equivalent to a plea of former adjudication, to wit, an affidavit setting forth in each case the proceedings and discharge in the case before the first justice, was set up. The causes being tried before different judges sitting in the Criminal Court, an opposite result was produced; one of said judges holding that the matter pleaded was a bar to the second proceeding, and the other

holding that it was not a bar, and the two judgments appealed from were accordingly entered.

The only question which we are asked to decide is, which of the two judgments is right.

Our statute concerning bastardy provides that upon complaint being made to a justice of the peace by an unmarried woman, etc., a warrant against the person charged with being the father of the child shall issue, and such reputed father shall be brought before the justice, and an examination as to the truth of the charge shall be had before the justice, and "if the justice shall be of the opinion that sufficient cause appears," he shall bind the person accused, in bond, with sufficient security "to appear at the next County Court to be holden in such county, to answer such charge, to which court said warrant and bond shall be returned, except in the county of Cook, where said warrant and bond shall be returned to the Criminal Court of Cook County;" and thereupon that court shall cause an issue to be made up whether the person charged is the real father of the child or not, which issue shall be tried by a jury.

It thus appears that by the terms of the act the jurisdiction of the justice is confined to a finding of whether or not "sufficient cause appears" to hold the person charged to the Criminal Court, where the real fact shall be determined, and that the jurisdiction of the Criminal Court to make up the issue and try it, attaches only when such finding shall have been made by the justice, and the warrant and bond in the proceedings before the justice have been returned into that court.

Thus, to compel a man to maintain a bastard child, two adjudications, each by a different tribunal, are necessary; one by the justice, that sufficient cause appears to hold him to another court where the main fact shall be tried, and the other by the County or Criminal Court to which he has been held, that he is in fact the father of the child, and the jurisdiction of the latter court to make the latter adjudication, depends upon the fact that a justice of the peace has made the former adjudication.

The statute makes no provision concerning what shall be done by the justice in case that in his opinion sufficient cause does not appear for holding the accused to the Criminal Court. The practice has been, however, so far as we are advised, for the justice to enter a finding that the accused is not guilty, and ordering him to be discharged, and the case dismissed, as was done by the justices by whom the first warrants were in these cases issued.

From such a judgment or discharge the bastardy act does not, in terms, give the right of appeal, nor can such right be found to have been given by the statutes anywhere, unless it be by section one of article X of chapter 79, entitled "Justices and Constables." By that section it is provided that "Appeals from judgments of justices of the peace and police magistrates to the Circuit or County Court * * * shall be granted in all cases except on judgments confessed."

If, under any reasonable construction of any statute, it could be held that the Circuit or County Court to which appeals from judgments of justices of the peace shall be granted "in all cases," has jurisdiction to determine whether "sufficient cause appears" to put a person charged with bastardy upon trial, we should be without difficulty.

It has been held that a proceeding in a bastardy case is not a criminal suit; that it is not an action *ex contractu*, nor one for punishment, nor for the imposition of a penalty for an immoral act, but is a right given by the statute to recover in a civil proceeding such sum, not exceeding the amount prescribed, as may be found to be necessary for the support of the child, in respect to which its father owes the duty of maintenance; and it is said that "the procedure relates to the remedy, and not to the cause of action." *Scharf v. The People*, 134 Ill. 240.

But it is also said that "although a bastardy proceeding is not a suit at common law, it is clearly a proceeding at law," within the meaning of the words "proceeding at law" employed in the Appellate Court act, and that therefore appeals lie in bastardy cases to that court from the County or Criminal Court. *Lee v. The People*, 140 Ill. 536.

Because of the policy of this State being favorable to the allowance of appeals by aggrieved litigants, and because of the oppression which would ensue to an indiscreet unmarried mother, whom the statute had attempted to relieve, she should be entitled to appeal, either in her own name or in the name of the people upon her relation, from an adverse judgment or discharge, or else she should be permitted to make another complaint before a different justice of the peace.

On the other hand, if, instead of her having the right of appeal, it be her right to repeat her complaint before a different justice as often as the ones to whom she has previously applied dismiss her complaint, there would seem to be a violation of that policy of the law that litigation once heard upon the merits, shall cease, except by way of review upon appeal or by writ of error; and men charged with bastardy will have inflicted upon them the oppression of having to answer the same charge many times over.

It is not easy to say which remedy the legislature has intended she shall have. In the cases at bar, the remedy pursued was that of making repeated complaints.

The Supreme Court of Wisconsin, in a case argued by very able counsel, has decided, under a statute very like our own, that where, as here, a second complaint in bastardy was made before another justice after a different justice had dismissed the first complaint, because a case of probable cause was not made out, and there had been no reversal or setting aside of that first judgment, that the first judgment constituted a final adjudication of the cause upon the merits, and was a complete bar to the second proceeding. *State ex rel. Dilworth v. Braun*, 31 Wis. 600.

We quote from the opinion in that case :

“ It is an elementary principle of the law, and one of universal application, that the judgment of a court of competent jurisdiction upon any subject-matter, is final between the same parties in all tribunals, unless the same be reversed by the appellate or supervisory court, or lawfully set aside by the court which rendered the judgment. Why does not

this principle apply here? A court having jurisdiction of the subject-matter, and of the person of the defendant, after full investigation and in strict compliance with the forms of law, has adjudged that there is not probable cause to believe that the relator is the father of the child in question. That judgment has not been reversed, but remains in full force. Why, then, is it not a verity in this case that no such probable cause exists? We think that it is, and that the adjudication of Justice McWhorter (the justice who, under the first complaint, discharged the defendant,) is final and conclusive in that behalf."

We have examined the Wisconsin statutes in force at the time that decision was made, and find that, in most essentials, the bastardy act of that State was like ours, and that it contains no express provision giving an appeal to the State, or the relator, from an adverse judgment by the justice, and the case appears to be exactly in point.

The Supreme Court of Indiana, in *Galvin v. The State ex rel. Crouch*, 56 Ind. 51, has passed upon the precise question of whether an appeal will lie by the State from an adverse judgment of the justice, under the general statute allowing appeals from justice's judgments in civil cases. It was there said: "It is true, that our statute regulating prosecutions for bastardy does not contain any express provision for an appeal by the State from the judgment of a justice in favor of the defendant. But it has been held by this court, that a prosecution in bastardy is a civil proceeding. In the third section of the bastardy act, it is provided, that in such prosecutions 'the rules of evidence shall be the same as in civil cases.' And the sixth section of said act provides, that the trial of such prosecutions, both before the justice and in the Circuit Court, shall, in all respects not otherwise provided for in said act, 'be governed by the law regulating civil suits.' Evidently, we think, the legislature intended that a prosecution for bastardy * * * should be regarded as a civil action. In the 64th section of the act defining the powers and duties of justices in civil cases, it is provided that 'any party may appeal from the judgment of any jus-

tice to the Court of Common Pleas of the county, or the Circuit Court.' * * * In our opinion, under the law of this State, the State may appeal from an adverse judgment of a justice, in a prosecution for bastardy, to the Circuit Court of the county."

Our bastardy act contains provisions to the same effect as those quoted from the Indiana statute, in the opinion of the Supreme Court of Indiana. Thus, section 3 of the act provides that in the proceeding before the justice, "evidence may be heard as in cases of trial before the County Court;" and in section 4, relating to the trial in the County or Criminal Court, the right is given to the person charged, "to controvert by all legal evidence the truth of said charge." We also have a similar statute, already quoted, permitting appeals "in all cases," and, as already seen, our Supreme Court has repeatedly held, as did the Indiana court, that a prosecution for bastardy is a civil action.

We know of no other cases in point, and if we should follow those decisions, we should have to hold that although in this State, as in Indiana, no express provision for an appeal by the State from an adverse judgment by the justice in a bastardy proceeding is given, yet such right of appeal exists under the provisions of the act concerning justices and constables, already quoted from, granting the right of appeal from judgments of justices "in all cases except in judgments confessed;" and that, as held in Wisconsin, such an adverse judgment, not appealed from, reversed, or set aside, constitutes an effectual bar to a second proceeding against the reputed father.

The majority of the court is opposed to following the rule laid down in those cases. It is thought that the better reason lies in holding that no appeal lies from the justice's judgment, and that such judgment, adverse to the people or the relator, constitutes no bar to a second complaint, because the bastardy act does not provide for an appeal, and because there is found no authority in that act for the justice of the peace to give any redress to the party complaining, but only to inquire and determine whether there is a sufficient cause

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shown for holding the accused in bonds to the Criminal Court, which alone can adjudge upon the merits, and because the Criminal Court is empowered to so adjudge only after a justice of the peace has passed upon the question of whether there be or not sufficient cause, and because there is not invested in any tribunal, except that of a justice of the peace, jurisdiction to pass upon the question of sufficient cause, which, under the statute, is a pre-requisite to an inquiry into, and adjudication upon, the real question of whether in fact the person charged is the real father of the child.

It is considered that in principle the case is analogous to that of a person charged with a criminal offense, and who, upon preliminary examination before a magistrate, has been discharged, but who may again be arrested and taken before a different magistrate and be held. *In re McIntyre*, 10 Ill. 422; *Bulson v. The People*, 31 Ill. 409.

It was therefore error in the first entitled case of *The People ex rel. v. Weiss*, to hold that the order entered upon the hearing of the first complaint before Justice Kaufman was a bar to a prosecution of the second complaint before Justice Everett, and the judgment in that behalf is reversed and the cause remanded, and the judgment in the second entitled case of *Waterloo v. The People ex rel., etc.*, is affirmed.

The question is one of very considerable collateral importance, and we will certify the Waterloo case to the Supreme Court, if desired.

George W. Fisk v. The Carbonized Stone Co., Christian Kurz and E. W. Huncke.

67	327
75	347
67	327
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e98	3 33

1. CORPORATION—*Who Authorized to Sign Notes for.*—The president and secretary are the usual and proper agents of a corporation through whom its name is, and should be affixed to its promissory notes. These officers have, by virtue of their offices, authority to execute promissory notes of the corporation, unless their authority in that respect is specifically limited.

2. CONSTRUCTION—*Of Instruments in Writing.*—In construing a written instrument, effect must be given, if possible, to every word.

3. CORPORATIONS—*Officers not Liable on Contract on Behalf of, if Authorized.*—Where a party signs his name as officer or agent of a corporation to evidences of indebtedness executed in its ordinary business, if it appears that it is the obligation of the corporation, and the agent or officer had authority to bind the corporation, he is not personally liable.

4. ASSIGNMENT OF ERROR—*By Plaintiff—On Judgment in His Favor.*—A plaintiff may assign for error the rendition of a judgment in his favor against one of several defendants who have been sued jointly as the makers of a promissory note.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 14, 1896.

STATEMENT OF THE CASE.

This was an action of assumpsit brought on the following instrument:

“ \$800.

CHICAGO, Oct. 26, 1895.

Two months after date we promise to pay to the order of Phoenix Stone Co., \$800, at 300 Clybourn Ave., Chicago. Value received.

CARBONIZED STONE Co., of Chicago.

CHRISTIAN KURZ, Pres.

E. W. HUNCKE, Secy.

No. 457. Due Dec. 28.”

The plaintiff declared on this instrument, impleading the Carbonized Stone Company, Christian Kurz and E. W. Huncke, laying damages in \$1,500. The declaration contained the common counts and a special count on the note.

A copy of this note was filed with the declaration, and an affidavit of the plaintiff's claim. Pleas of the general issue and a denial of joint liability, verified, were filed by the defendant Kurz, and issue was joined on these pleas. The defendant Huncke and the Carbonized Stone Company filed no pleas. Default was entered against the defendant Huncke, and no evidence was offered on behalf of the defendant Huncke.

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The plaintiff requested the court to hold, as a matter of law, that the defendant Christian Kurz was liable personally as a maker of the note in evidence, and that the defendant E. W. Huncke, as a matter of law, was liable as a maker of the note offered in evidence, and that as a matter of fact and law, both Christian Kurz and E. W. Huncke were makers of said note and liable thereon. All of which the court refused.

The court found the issues for the defendant Christian Kurz, and refused to assess damages or enter final judgment against E. W. Huncke, and assessed damages against the Carbonized Stone Co. for the sum of eight hundred and ten dollars and found for the other defendants. The plaintiff filed a motion for a new trial. The court overruled the plaintiff's motion for a new trial, and entered final judgment. The plaintiff entered his exceptions and prayed an appeal to this court.

The following testimony was given upon the trial:

“Mr. Miller: On October 28, 1895, what, if any, relation did you sustain to the Carbonized Stone Company?”

Question repeated: A. I was president for the Carbonized Stone Company at that time.

Mr. Miller: Under what circumstances did you sign your name to that note? A. The company owed the Phoenix Stone Company \$600. The note was sent up to my office by the secretary of the Phoenix Stone Company. They accepted the note and wanted me to sign it as president and secretary. The secretary sent up to my office for my signature.

Mr. Miller: Did you sign it? A. I signed it and sent it back to him, to the company. They called for it and got it. The Phoenix Stone Company sent for it at the office and got it.

Q. Who signed that ‘Carbonized Stone Company, Chicago?’

The Court: If you know?

A. That is, the book-keepers make out the notes; the book-keeper of Mr. Huncke.

Q. That is the secretary? A. Yes, sir.

Q. That is Mr. Huncke's book-keeper? A. Yes, sir. I did.

Q. Did you sign that as president? A. Yes, sir.

Q. You may state whether or not your company, the Carbonized Stone Company, were, at and before the signing of that note, doing business with the Phoenix Stone Company? A. Yes, sir.

Mr. Miller: What business? A. Getting stone of them.

Q. Then you bought stone from them? A. Yes, sir; then we bought stone from them."

Herman M. Zapel testified: "I was manager of the Carbonized Stone Company.

Q. Do you know anything about the execution of this note? A. Yes, sir; some time in the early part of October, Mr. George Pretzel, representing the Phoenix Stone Company, came to me and told me that they were in need of money. I told him the contracts the Carbonized Stone Company had at the time. They were a little tight on money; and he made the remark to me that they would be willing to take the company's note, two months, sixty days. And on the strength of what he said, I told Mr. Pretzel I would see the president and secretary of the company, and ask them if they would be willing to give the note, and I done so, and after I stated to the president and secretary the case—

The Court: What was done?

A. The note was issued. I am stating my personal knowledge, yes, sir. The note was issued by the secretary.

Mr. Coburn: Wait a moment. Were you the secretary? A. No; I was not the secretary.

Witness (continuing): I was present when the note was made out by the secretary in the company's office, and sent from the company's office to Mr. Kurz, the president."

HENRY M. COBURN, attorney for appellant.

LACKNER & BUTZ, attorneys for Christian Kurz, appellee.

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MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The president and secretary are the usual and proper agents of a corporation, through whom its name is and should be affixed to its promissory notes. Those officers have, by virtue of their offices, authority to execute promissory notes of the corporation, unless their authority in that respect is specifically limited. *Poole et al. v. West Point B. & C. A.*, 30 Fed. Rep. 513; *Miers v. Coates*, 57 Ill. App. 216.

In construing a written instrument, effect must be given, if possible, to every word.

“Where a party signs his name as cashier or agent of a banking, railroad, or other corporation, in drawing drafts and bills, or other evidence of indebtedness in its ordinary business, if it appears that it is the obligation of the corporation, and the cashier or agent, or other officer, had authority to bind the corporation, he is not personally liable.” *Scanlon v. Keith*, 102 Ill. 634; *Hypes v. Griffin*, 89 Ill. 134; *Newmarket Savings Bank v. Gilett*, 100 Ill. 254; *Draper v. Mass. S. H. Co.*, 87 Mass. 338.

Upon its face, and by the oral testimony at the trial, the note in question appears to be that of the stone company, only.

Three persons, having been sued in assumpsit, judgment was rendered against one, only. Appellant, who brought the suit and obtained this judgment, now assigns that it was error to render judgment against one only; that the recovery should have been against all, or none.

As plaintiff's judgment against the stone company does him no harm, we should have thought that appellant could not assign as error that of which he can not justly complain; but that the Supreme Court, in *Kingsland et al. v. Koeppe et al.*, 137 Ill. 344, held that this can be done, reversing the judgment of this court in the same case, reported in 35 Ill. App. 81.

The judgment of the Circuit Court is, for the error last mentioned, reversed, and the cause remanded.

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67	623
67	332
179	609

Illinois Central Railroad Company v. Harry C. Weiland.

1. **STATUTE OF LIMITATIONS**—*As to Additional Counts.*—Where additional counts, filed by leave of the court, after the statutory period has run, are but restatements of the same cause of action upon different grounds, a demurrer to a plea of the statute of limitations to such counts is properly overruled.

2. **MASTER AND SERVANT**—*When the Servant Will Not be Held Guilty of Contributory Negligence—A Question for the Jury.*—A servant will not be held guilty of concurrent or contributory negligence, if he continues in the employment of the master, under a promise to relieve him from extraordinary and known dangers within a reasonable time, but it is a question for the jury to say whether or not such servant was, under the circumstances, guilty of contributory negligence by continuing in such service.

3. **CONTRIBUTORY NEGLIGENCE**—*When a Question of Fact.*—Unless the danger be so imminent that no prudent person would undertake to perform or continue in the service, it is not a question of law, but only one of fact, whether the servant contributed to the injury by continuing in the service.

Action, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

JOHN C. DRENNAN, attorney for appellant; JAMES FENTRESS, of counsel.

JAMES D. McSHANE, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was in the service of the appellant as a switchman, and at the time of the trial, which was about two and a half years after he received the injury for which he sued, he was thirty-five years of age. The direct injury received by him resulted in the amputation of three fingers of his left hand at the knuckles, and the crooking of his little finger at the first joint. He had worked as switch-

man seven years, and at the time of the accident was earning from \$3 to \$4 a day. His greatest earnings since the accident have been \$1.50 a day.

The jury gave him a verdict for \$6,500, which was remitted down to \$4,500, and judgment for that amount rendered.

It is urged that the court erred in sustaining appellee's demurrer to the appellant's plea of the statute of limitations to certain additional counts filed by appellee, more than two years after the filing of the original declaration, on the ground that such additional counts set up a new cause of action.

We have examined the original and the additional counts, and think the court properly sustained the demurrer to the plea of the statute. The cause of action stated was the same in each.

The injury was the cause of action. The various counts were but restatements of the same cause of action upon different grounds. *Swift & Co. v. Foster*, 55 Ill. App. 280; *Swift & Co. v. Madden*, 63 Ill. App. 341.

The negligence of appellant, upon which the appellee relies, and which was alleged in one or more of the several counts of the declaration, consisted, first, in not furnishing a sufficient number of men to do the work in which appellee was assisting, to enable the appellee to perform his duty with reasonable safety to himself, and, the dangers being complained of and made known to appellant, a promise by appellant, through its empowered agent, to give appellee safer employment in a reasonable time, accompanied by a request to appellee to continue in the work as it was until such remedy could be furnished; second, in furnishing appellee with a car whose appliances were defective, in that its brake was out of order.

During the two or three months immediately preceding the accident, the appellee had worked in the transfer yards of the appellant, as a member of a "stake" engine crew, engaged in the distribution of freight cars from the in-bound yards to the out-bound yards. Connecting such

divisions of the yards there were two parallel tracks, a portion of which were gravity tracks, extending from the top of what is spoken of as "the hill," beginning at or near one end of the in-bound yards, and inclining downward toward what is called a "puzzle" or "diamond" switch, located near the entrance to the out-bound yards. By means of such switch, cars coming down the gravity tracks were distributed to the appropriate tracks on which out-going trains were made up. The "stake" engine was operated on one of the two parallel tracks, and, by means of a stake extending from it to the corner of a car upon the other track, would push the car along to the point where the incline downward in the track began, and then leave it and go back for another car. The momentum so given to the car by the push of the engine and the downward inclination of the tracks, was calculated to be sufficient to carry the shunted car over the "puzzle" switch, and as far as necessary into the out-bound yard. As a shunted car should approach, it was the duty of the switchman waiting for it at the "puzzle" switch to set the switch so as to conduct the car upon the appropriate distributing track beyond. Signs, or marks, which he understood, would indicate to him the track for which the approaching car was destined. Then, as the car came, he would catch and climb upon it, and there operate its brake, so as to regulate its speed for its point of destination, and as it approached the car or train to which it was to be coupled, he would descend from the rear end of the car and run ahead on the ground, so as to be ready to do the coupling at the instant it should strike the car to which it was to be joined. Completing the coupling work, he was required to get back to the "puzzle" switch in time to repeat a like duty with reference to the next car that should be shunted down the gravity track. This, it was testified, was lively work, and kept the switchman on the run.

Appellee testified that on the day in question when he reached the top of the car and took hold of the brake, he noticed that the brake did not work effectually, but that he

did the best he could with it, and when he supposed he had sufficiently reduced its speed, he descended to the ground and ran past the car to its front end in order to couple it to the standing car ahead.

Reaching there while the shunted car was yet in motion and about ten feet distant from the car ahead, and looking forward to the standing car, he saw that there was in that car a coupling link which would prevent the coupling of the two cars if the link which was in the moving car were not removed. He, accordingly, "hustled" to throw out the link in the moving car, with his right hand, and as the cars were about to come together he stooped and reached his left arm under the "dead-woods," which were on both cars, and extending his hand upward to guide the link into its place, the moving car came so rapidly that his hand was caught and his fingers crushed.

It is claimed that the accident would not have happened, except for the rapid approach of the shunted car, and that because of the defective brake, its speed could not be sufficiently lessened by the appellee within the short time intervening between the time when he was obliged to mount the car at or near the switch, and when he had to dismount in order to be ready to do the coupling.

It does not appear with certainty just how much time did so elapse, but the distance that the car had to traverse was not great, considering what had to be done.

It did appear that it was a box car, and that the brake was on its front end; that the ladders or steps were on the ends and not on the sides of the car; that it was hazardous to mount or dismount except at the rear end of a car so moving, lest in case of a slip or a fall, the car would run over the person who should fall, and that it was customary to use only the rear ladders. After mounting, it was, therefore, necessary that the appellee should, as he did, go from the rear to the front end of the top of the car, there operate the brake so as to properly adjust the speed of the car, then pass back to the rear and descend to the ground and run along past the car to its front end and make the coupling.

And it was made to appear, as is nearly obvious, that to do what was so necessary, required very quick work, and we may say, required the exercise of much judgment, agility, dexterity and exactness.

It was also shown that it was dangerous work, which may readily be perceived.

Upon the question of whether the brake was, or not, defective, in that its shoes were so worn as to imperfectly press upon the wheels of the car, there was a contrariety of opinion among the witnesses.

The appellee testified that he instantly felt, when he began to operate the brake, that it was not fully performing its proper work; that the brake-shoes were too much worn; and it is altogether probable that a person accustomed to braking, as he was, may in that way immediately detect the imperfect application of such an appliance.

On the other hand, it was shown by several witnesses for the appellant, who either examined the brake or had the opportunity of observing it, that they saw nothing that interfered with its effectiveness.

It was also shown by appellant that a general system prevailed of inspecting all cars entering and departing from the yards, and that the inspector's minutes showed that this car had been examined the day before, and while reporting that some of its door boards were broken, the minutes were silent as to the condition of the brake-shoes, and it is urged that from such fact of silence the inference is that the shoes were in good order.

In connection with this subject, it should be stated that the car in question did not belong to appellant, but was what is called a foreign car, and that it was testified by two of appellant's car inspectors, on cross-examination, and not contradicted, that the policy pursued in making an inspection was to report no defects in a foreign car unless they were of a kind that absolutely required to be repaired in order that the car could be got off appellant's road in safety.

We do not see that we may say, that as a matter of law,

there was not enough evidence, considering the evidence and all legitimate inferences that could justifiably be drawn from it, to warrant the submission of the case to the jury under the count of the declaration which alleged the negligence of appellant to consist in the furnishing of the imperfect brake, whereby the speed of the car could not be properly and safely regulated.

The question of whether the appellee was, at the time of the injury, in the exercise of due care for his own safety, is closely associated with the other question, whether appellant was negligent in failing to furnish a sufficient number of switchmen to enable appellee to perform his duties in reasonable safety.

We have already stated, in substance, what was being required of appellee in the performance of his duties.

It was proved in the case, and not contradicted, that it was not customary, except in the case of "stake" engine crews, for switchmen to do both switching, car-riding, and coupling.

It was also proved, that some time before, when appellee worked with the stake engine crew, six men did the work that four men were required to do when he was put back at the same work about three months before he was injured; that upon the man protesting that four men were not sufficient to do the work, the yard-master added a fifth man, which was the number of the crew when appellee was hurt.

When six men comprised the number, one of them attended the "puzzle" switch, leaving the others to catch and ride the cars and couple them.

With but five in the crew, each car rider and coupler did the switching also, and such was the method of working at the time of the accident.

Just before the fifth man was put on, the crew, by a committee of their number, made a protest to the yard-master, on the ground that it was dangerous for four men, constituting the crew, to do the work. The yard-master made no response in words, but within a few days he added a fifth man. The addition of this man did not change the respect-

ive duties of each of the crew—they still were required to do switching, riding and coupling—but it gave them more time to return to the puzzle switch, and be prepared for the cars that were shunted down the gravity tracks for distribution.

About two weeks after the fifth man was put on, the appellee, as he testified, went again to the yard-master, and said to him: “Jake, how about changing off this engine; this work is too dangerous, and there is too much running; it is too hard work all round;” and the yard-master answered: “Well, I will see what I can do for you.” No change being made, appellee, as he testified, about three days before he was hurt spoke with the yard-master again, as follows:

“I says, ‘Jake, I want a job off of this engine. The work is too dangerous;’ and I says, ‘I ain’t going to stay here any longer,’ or something similar to that. And he says, ‘All right,’ he says, ‘I will take you off of here in just a day or two,’ he says, ‘stay there for a day or two longer.’”

The yard-master denied having had either of the said two separate interviews with appellee, and that he made any such statements or promises to him.

It seems to be admitted that the yard-master was the officer of the appellant who had control of all such matters, and that in him lay the power of employment and discharge of all who worked under him.

And we think it to be clearly a question of fact for the jury to say, under the evidence, what the truth of the matter was concerning the promise testified to by appellee as having been made by the yard-master.

If such promise were made, and the jury must, by their general verdict, be considered to have so found, then as a matter of law it seems to be settled, that, relying upon such promise, the appellee can not, as a matter of law, be held to have assumed the special risk of the dangers of which he was complaining. *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573.

He did, of course, assume the switchmen’s ordinary dan-

gers, but the special dangers arising from lack of sufficient force to do the work at which he was put, in reasonable safety, we think he may not be held to be responsible for, after the promise was made, and he was told by his superior to continue at work until the promise could be fulfilled.

It was said, in *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642 (p. 648):

“The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work.” See, also, *Swift & Co. v. Rutkowski* (No. 6510 this term).

As a matter of law, the servant will not be held guilty of concurrent or contributory negligence, if he continues in his employment under a promise to relieve him from the extraordinary, though known, dangers, within a reasonable time, but it is a question for the jury to say whether or not he was, under such circumstances, guilty of contributory negligence. *Hough v. Railway Co.*, 100 U. S. 213; *Anderson Pressed Brick Co. v. Sobkowiak*, *supra*; *Furnace Co. v. Abend*, 107 Ill. 44.

Unless the danger be so imminent that no prudent person would undertake to perform or continue in the service, it is not, under such circumstances, a question of law, but only one of fact, whether the servant contributed to the injury by continuing in the service. *Anderson Pressed Brick Co v. Sobkowiak*, *supra*.

That no such extreme and imminent danger existed in the case at bar, as would make the rule, just stated, applicable to the appellee, is apparent from the fact that the work as done was participated in by the entire crew, of which appellee was a member, both before and up to the time when the alleged promise was made.

We regard the question as being an exceedingly close one, whether a recovery may be sustained in this case, first, as to whether the appellee, after discovering, as he observed, that the brake was deficient in its applying force to the car

wheels, was justified in attempting to make the coupling, especially after he saw the fact that the car ahead had a coupler in it, as well as that the shunted car was in the same condition, thus requiring more work than usual to be done in less than the customary time; or, second, whether there was such a preponderance of evidence as the law requires to warrant the finding that in fact the new promise and request to continue in the work, were made as the appellee testified, and that relying upon such promise, he continued in his work. But in view of the weight which, under the law, we are bound to yield to the verdicts of juries upon pure questions of fact, we are disinclined to disturb the judgment, which is apparently quite reasonable in amount, if any recovery can be had.

No instructions were asked by the appellee. Of the many offered by the appellant, some were given as asked, others were given in a modified form, and still others were refused altogether.

They are too numerous to discuss in detail, but from a consideration of them all, we think the jury were fully and fairly instructed as to the law of the case, and that no substantial error was committed by the trial court concerning them.

It is urged as error that counsel for appellee made improper remarks in his argument to the jury. We do not think the remarks complained of can be said to constitute serious error, and refer to *Harms v. Stier*, No. 6574, this term.

Other questions have been argued, but what we have said concerning what we regard to be the controlling features of the case, must suffice.

The judgment of the Superior Court will be affirmed, and it is so ordered.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1896.

**Walter E. Williamson v. Anton Ohnemus & Alexander
Ohnemus, Copartners as A. Ohnemus & Bro.**

1. EVIDENCE—*Error in Admission of, Cured by Subsequent Testimony.*—An error of the trial court in the admission of testimony may be cured by the subsequent testimony of the witness.

Assumpsit, for goods sold. Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

L. E. EMMONS, JR., attorney for appellant.

HAMILTON & WOODS, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by the appellees against appellant to recover the value of a certain heating apparatus consisting of a furnace, pipes, registers, etc., furnished for the house of appellant.

The defense was that appellees were merely sub-contractors under one Austin, and that their contract was with Austin, who was the contractor to whom alone appellant was answerable, and to whom alone the appellees were to look for the amount of their bill.

A trial by jury resulted in a finding of the issues for the appellees, the damages being assessed at \$298.05. The court refused a motion for new trial and rendered a judgment on the verdict, from which the present appeal is prosecuted. The question argued in the brief of appellant is whether the evidence supports the verdict. There was a square conflict. On the part of the appellees there was enough, if believed, to justify the conclusion that they dealt directly with the appellant, that it was so understood by the parties, and that the appellees had therefore a perfect right to call upon the appellant for the full amount due them for the work.

On the other hand the evidence would, if credited and uncontradicted, justify the opposite conclusion and it was for the jury to determine the issue thus presented. It is urged that the court erred in permitting Austin to answer whether he contracted with appellees for the work in question because this called for a conclusion.

Whatever of error there was herein, was obviated by the subsequent testimony of the witness when he proceeded in detail to state what he said and did in that behalf. No exception appears to any other rulings in the admission of evidence or the giving of instructions.

The judgment will be affirmed.

C. M. Sherer and D. J. Sherer, Partners as C. M. Sherer & Co., v. Ira W. Langford.

1. CONSOLIDATION OF CLAIMS—*Before Justice of the Peace.*—Where a party who held two accounts against another, the total amount of which did not exceed the jurisdiction of a justice of the peace, postponed the time of payment of one by mutual agreement with his debtor, and commenced a suit upon the other before a justice of the peace which he prosecuted to final judgment, *it was held* that the judgment so recovered was not a bar to a suit upon the other account, the payment of which was postponed by agreement.

Assumpsit, for goods sold. Appeal from the County Court of Edgar County; the Hon. SUMNER S. ANDERSON, Judge, presiding. Heard in this

Sherer v. Langford.

court at the May term, 1896. Reversed and remanded. Opinion filed November 25, 1896.

H. S. TANNER and J. E. DYAS, attorneys for appellants.

SELLER & SHEPHERD, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This suit originated before a justice of the peace, and was based upon an open account for lumber furnished by plaintiffs to defendant.

It was removed by appeal to the County Court, and the defense there was that this account was a part of another which had been made the basis of a prior suit before a justice of the peace and that the judgment in the former suit was a bar to the proceeding in this. The plaintiffs insisted that this account was not due when the former suit was commenced. The evidence was somewhat conflicting upon the point and the court found for the defendant and dismissed the suit. We have read the evidence with care and are forced to disagree with the conclusion reached by the court. We think it very clearly appears from the preponderance of the evidence that the time for payment of this account had been extended by agreement of the parties to a date subsequent to the beginning of the former suit.

The account here sued on was for lumber obtained at different dates, and used in a building known as a canning factory owned and managed by defendant. That upon which the former suit was based, was for similar material furnished for use in a structure known as a knitting mill, also operated by defendant, and was due and payable before any of the accounts in the present suit was incurred. It is apparent that defendant as well as the plaintiffs treated the two accounts as entirely separate and distinct.

The parties having, by mutual agreement, postponed the time of payment of the canning factory account to a day subsequent to the commencement of the former suit on the knitting mill account, and the defendant having thereby obtained an extension of credit for several months, he ought

not to be permitted to repudiate the agreement on the ground of a want of consideration. He has enjoyed the benefit of it and is estopped to deny it. The plaintiffs having in good faith abided by it were legally warranted in regarding the account as not due when the former suit was commenced.

The judgment will be reversed and the cause remanded.

Thomas B. Williams v. The People of the State of Illinois.

1. CRIMINAL LAW—*Lewdness, When Deemed to be Open.*—Lewdness is deemed to be open only when it is committed in the presence of another, or in a place open to the public view.

2. CRIMINAL PLEADINGS—*Sufficiency of Information Under the Statute.*—If the language of the statute sufficiently describes the act constituting the offense, then no more is required than that the words of the statute be employed in the information or indictment; but where the statute does not so describe such acts, the information or indictment must specifically set them forth.

3. SAME—*Information for Lewdness.*—An information for lewdness, under section 55 of the criminal code, which does not contain averments that a notorious act of public indecency was committed, is fatally defective.

Indictment, for lewdness. Error to the County Court of Piatt County; the Hon. F. M. SHONKWILER, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed November 25, 1896.

M. R. DAVIDSON and JAMES HICKS, attorneys for plaintiff in error.

H. H. CREA, State's Attorney, for defendant in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The court overruled a motion of the plaintiff in error to

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quash a criminal information against him, the material averments whereof were, that the plaintiff in error, on, etc., at, etc., "did make an indecent exposure of his private person, tending to debauch the public morals, contrary," etc.

The 55th section of the criminal code, upon which it was sought to base the information, is as follows:

"Whoever is guilty of open lewdness * * * or other notorious act of public indecency tending to debauch the public morals, shall be fined not exceeding \$200."

This statute denounces open lewdness and notorious acts of public indecency.

Lewdness is to be deemed "open" only when it is committed in the presence of another person, or in a place open to the public view. 4 Black. Com. 64; 1 Bishop Crim. Law, 947 and 1126; 7 Amer. & Eng. Ency. 534, and 13 Amer. & Eng. Ency. 276.

The precedents of indictments prepared by Mr. Wharton contains the allegations that the exposure of the person was in the presence of another person, or was made in a public place. Wharton, Precedents of Indictments, Vol. 2, pp. 306, 307-8-9.

The information under consideration has no such allegations, nor is it averred therein that a "notorious act of public indecency" was committed.

It was not allowable to put defendant upon trial without a specification of the offense in the indictment or information.

If the language of the statute sufficiently describes the act or acts constituting the offense, then no more is required than that the words of the statute be employed in the information or indictment; but when, as in the case at bar, the statute does not so describe such acts, then the indictment must specifically set them forth. Johnson v. People, 113 Ill. p. 102.

The motions to quash the information should have been sustained.

The judgment must be, and is, reversed.

R. D. Ward v. William Montgomery.

1. **WAIVER—Form of Action.**—A person who is entitled to bring an action in tort for the conversion of property may waive the tort and bring the same in assumpsit.

2. **JUSTICES' COURTS—But one Form of Action.**—There is but one form of action in justices' courts.

3. **DEMAND FOR POSSESSION—When unnecessary.**—When the circumstances of a case clearly evince that a demand for possession of personal property would have been disregarded and entirely unavailing, a formal demand before bringing suit for its value is unnecessary.

Assumpsit, for value of property converted. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

STATEMENT OF THE CASE.

Appellee obtained judgment against appellant before a justice of the peace, and also in the Circuit Court on appeal, for the value of a house which had been erected upon a lot belonging to appellant under contract, it might be removed.

Appellee did not build the house, but with the acquiescence of appellant acquired the right and interest of those who did, and for a time had possession of it.

Appellant finally possessed himself of the building, exercised exclusive control thereof, and in response to a demand from appellee for rent, refused to pay, and wrote him a letter, which was properly construed by the court to assert appellee had no right in the house, and to challenge him to institute suit in order it might appear he had no such right or interest.

Appellee brought assumpsit for the value of the house—prevailed—and hence this appeal.

MILLS BROTHERS, attorneys for appellant.

LEFORGEE & LEE, attorneys for appellee.

Consolidated Coal Co. v. Bokamp.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee might have brought his action in tort, but we feel concluded by the case of *Elgin v. Joslyn*, 136 Ill. 532, to hold he could waive the tort and bring *assumpsit*.

Aside from this the justice had jurisdiction in actions for taking or detaining personal property, and there is but one form of action in such courts.

Appellant had possession of the building, exercised acts of exclusive dominion over it, in denial of the right of appellee, and his conduct and the letter written by him to appellee clearly evinced a demand for possession would have been disregarded and entirely unavailing.

A formal demand was therefore unnecessary. *Keller v. Robinson*, 153 Ill. 458; *Cooley on Torts*, 524, 525; 5th Amer. & Eng. Ency. of Law, p. 528, note 2.

The contention of appellant he held possession under agreement with appellee, he should do so in order to secure to him the repayment of taxes paid by him upon the house, it and the lot having been assessed and taxed together, was submitted to the jury under instructions which are not questioned.

The testimony on the point whether he was so authorized to possess himself of the building, was conflicting, and no reason appears we should assume to interfere with the finding of the jury upon it.

The judgment is affirmed.

Consolidated Coal Company v. Frank Bokamp.

1. BILL OF EXCEPTIONS—*Practice on Motions to Amend*.—It is competent for the court by an order at the same time to adjudge that a bill of exceptions does not contain all the testimony produced upon the trial, and to order it amended in accordance with the truth of the matter, but an order that the testimony produced upon the hearing of the motion to amend, and upon which the party seeking to amend, re-

lied to convince the judge that the bill did not contain all the evidence, should be made a part of the transcript of the testimony in the bill of exceptions, is not sufficient to effect an amendment of the bill, there being no finding of the judge upon the vital question.

2. INSTRUCTIONS—*Must be Based upon Evidence in the Case.*—In the absence of proof of a material fact, it is error to give an instruction upon it. Instructions must be based upon evidence in the case.

Actions, for personal injuries. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

CHARLES W. THOMAS, attorney for appellant.

A. N. YANCEY and PEEBLES & PEEBLES, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was in favor of appellee for damages sustained because of personal injuries received, by reason of alleged negligent failure of appellant company to properly support the roof of an entry or passage way in one of its mines in which appellee was engaged at work as its employe.

The appellee had knowledge of the alleged insufficient and dangerous condition of the timbers which constituted the support of the roof and of the peril to which he was thereby exposed.

His counsel sought to avoid the imputation he was guilty of a lack of ordinary care in continuing at work in a place of known danger, by procuring to be given to the jury the following instruction, viz.:

“1. The court instructs the jury for the plaintiff that if they believe from the evidence that the plaintiff was in the employment of the defendant, and was working under the orders and by the direction of the ‘pit boss,’ or other officer or agent in charge of said coal mine, and that the plaintiff discovered defects in the supports of the roof over the

roadway over which the plaintiff was required to run the coal cars of the defendant, and that he notified the 'pit boss,' or other agent or employe of said defendant then and there in charge of the defendant's coal mine, of the existence of such defects, and of the dangerous condition of the supports of the roof of said mine, and that said 'pit boss,' agent or employe of the defendant then in charge of the said mine, promised the plaintiff to repair the same so as to render the same safe, and then the plaintiff, relying upon such promise to repair, continued to work at the part of said mine where said defect in said roof was situated (if the jury believe from the evidence that any such defects existed) and that the defendant did not, within a reasonable time after notice of such defects, repair the same so as to render the same reasonably safe, and the injuries sustained by the plaintiff (if the jury believe from the evidence that the plaintiff was injured), resulted from the defects in said mine which the plaintiff had called attention to, and which the defendants had promised to repair, then the jury should find the issues for the plaintiff provided the jury believe from the evidence that the plaintiff was at the time of injury in the exercise of reasonable care for his own safety."

It is conceded it does not appear from the transcript of the testimony incorporated in the bill of exceptions signed and sealed by the judge, any proof was made that any employe of the company promised appellee the "defects in the supports of the roof," should be "repaired" or "rendered safe."

After the bill of exceptions had been signed, but during the same term of court at which the case was tried, a motion was made to amend the bill of exceptions and the following order was entered by the court, viz.:

"Be it remembered that on this 30th day of April, 1896, a dispute having arisen between counsel as to what the plaintiff, Bokamp, testified to on the trial of this cause respecting a promise on the part of the master to repair the place complained of in the declaration, and the judge who presided at the trial having no recollection of such statement, and it

appearing to the court that the official stenographer of the court took notes of the evidence during the trial, and that nothing appears in her notes of such evidence and the said stenographer stating that she has no recollection of it, it is ordered by the judge that the said plaintiff, Bokamp, upon the motion of the plaintiff, be recalled to testify as to what he did testify respecting such fact on the trial, to which action of the court the defendant, by its counsel, objects, and objects to the hearing of such statement by the court, which objection the judge overrules, to which ruling the defendant excepts."

"Frank Bokamp, being recalled, in answer to interrogatories propounded by Judge Shirley, testified as follows:" (Here follows a number of interrogatories and cross-interrogatories and the answers of appellee thereto.)

"It is ordered by the judge that the statements here made by the witness Bokamp, as to what he testified to on the trial, be made a part of the transcript of his evidence; to which order the defendant, by its counsel, objects; which objection is overruled and defendant excepts."

It was competent for the court, by an order entered at the same term of the court, to adjudge the bill of exceptions did not contain all the testimony produced upon the trial and to order it amended in accordance with the truth of the matter.

But the difficulty is, the court did not order the bill of exceptions should be amended, but only that the testimony produced upon the hearing of the motion to amend and upon which appellee relied to convince the trial judge the bill did not contain all the evidence, should be made a part of the transcript of appellee's testimony in the bill of exceptions.

We have here a record showing the trial judge had no recollection that the appellee testified to a promise and that the notes of the official stenographer did not show he so testified, and the testimony of the appellee, taken on the hearing of the motion to amend the bill of exceptions, to the effect he did state, when testifying as a witness at the trial,

that the promise was made, and that he had not been influenced by any one since the trial to make the latter statement, but we have no finding of the court upon the vital question.

We have, therefore, a bill of exceptions from which it does not appear the promise was given, and the evidence submitted to the court upon the hearing of a motion to amend the bill in that respect.

It is not our province to determine what testimony was heard by the jury.

The trial court must settle that by a bill of exception, and by that we are to be governed.

In the absence of proof of a promise as claimed, it was error to give the instruction heretofore set out.

No other instruction was given advising the jury as to the right of the ground of the right of appellee to recover.

Other instructions which were given related solely to the tests which the jury should apply in passing upon the competency of witnesses and in determining as to the weight of their testimony and as to the elements of damages proper for consideration.

The recovery, therefore, rested upon an instruction which we are required to hold was not supported by any testimony.

For the error in giving it we must, in the condition we find the record, reverse the judgment and remand the case.

Cleveland, C., C. & St. L. Ry. Co. v. Francis M. Pattison.

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1. RAILROADS—*Not Relieved from Liability by Legislative Grant.*—The legislative grant authorizing the Cleveland, Cincinnati, Chicago & St. Louis Railway Co. to construct and operate its road does not relieve it from liability to answer in damages for a nuisance, unless such nuisance arises as a necessary and natural result of the proper operation of its road.

2. SAME—*Damages Resulting from Negligent Operation.*—Damages resulting from the negligent operation of a railroad are not presumed to have been taken into account when the right of way was procured, but only such as necessarily result where due and proper care is exercised.

3. MEASURE OF DAMAGES—*Nuisances, Resulting from Improper Operation of Railroads.*—When the injury is to physical comfort, and results in the deprivation of the wholesome and comfortable enjoyment of a home, the measure of damages is compensation for such physical discomfort and deprivation. The amount must be left to the sound judgment, experience and discretion of the jury, in view of the facts of the particular case.

4. NUISANCES—*Assessment of Damages—Not Prospective.*—When a nuisance is temporary in its character the law presumes it will not continue forever, and in actions for damages for the same it is not proper to receive evidence that the property affected thereby has been permanently depreciated in value, and the assessment of damages should be for past and not for prospective damages.

5. SAME—*Damages—Successive Actions.*—The theory of the law is, that the infliction of past damages will cause the abatement of a temporary nuisance. If it does not, successive actions may be maintained, and damages, both compensatory and exemplary, awarded until the wrong is discontinued.

Trespass on the Case, for a nuisance. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

STATEMENT OF THE CASE.

The declaration was in case by appellee, and charged the appellant company maintained a switch in front of and near his dwelling house, and suffered certain of its stock cars, loaded with hogs and cattle, and certain other cars in which stock had been transported, to stand and be upon such side track for a long space of time, etc., and that noxious, offensive and unwholesome smells and odors arose from said animals and from filth and offensive matters in the cars, and from the decaying bodies of dead animals therein, and entered and permeated his dwelling house and rendered his home unhealthy, unwholesome and unfit for habitation, and that the company unnecessarily and negligently permitted its locomotive engines to stand and remain upon said side tracks, emitting noisome, noxious and offensive vapors, fumes, smoke, smell, dust, cinders, etc., which entered his dwelling and rendered it uncomfortable, unwholesome, unhealthy and unfit for habitation. Verdict and judgment for appellee in the sum of \$1,500, and the company appealed.

JOHN T. DYE, attorney for appellant; C. S. CONGER and R. L. MCKINLAY, of counsel.

H. S. TANNER and EADS & EADS, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The legislative grant authorizing the company to construct and operate the railroad, had no effect to relieve it from liability to answer in damages for nuisances, unless such nuisance arose as a necessary and natural result of the proper operation of its road. 19 Amer. & Eng. Ency. of Law, 923.

Damages resulting from negligent operation are not presumed to have been taken into account when the right of way was procured, but only such as necessarily and naturally result, though due and proper care be exercised. O. & M. R. R. v. Wachter, 123 Ill. 444.

When the injury is to physical comfort, and results in the deprivation of the wholesome and comfortable enjoyment of a home, the measure of damage is compensation for such physical discomfort and deprivation.

The amount necessary to compensate the plaintiff must be left to the sound judgment, experience and discretion of the jury, in view of the facts of the particular case. Gemp v. Bossham, 60 Ill. App. 84; Wood on Nuisance, 887.

But the court permitted appellee to introduce testimony as to the value of the property before and after the creation of the nuisance, and to show it had greatly depreciated in value. The verdict was largely based upon such evidence and is clearly excessive, if such testimony was not competent.

The alleged nuisances did not effect a permanent change in the property of appellee, and were, within themselves, temporary in character. They were illegal and, the law assumes, will not continue forever.

It was, therefore, not proper to receive evidence that the property had been permanently depreciated in value.

The assessment should have been for past, not perspective damages.

The theory of law is the infliction of past damages will cause the abatement of a temporary nuisance.

If it does not, successive actions may be maintained, and damages, both compensatory and exemplary, awarded until the wrong-doing is discontinued. Schlitz Brewing Co. v. Compton, 142 Ill. 511.

The judgment is reversed and the cause remanded.

L. C. Young v. James Heffernan.

1. LANDLORD AND TENANT—*When the Tenant May Deny his Landlord's Title.*—The rule that a tenant may not deny his landlord's title has no application when the tenant at the time of executing the lease creating the relation was in possession of the premises under another, and was induced to execute the lease in question by artifice or fraud.

2. PAROL EVIDENCE—*When Competent to Impeach a Lease.*—Upon the trial in an action of forcible detainer, it is competent for the defendant to introduce parol testimony to support his assertion that he was induced to execute the lease creating the relation of landlord and tenant between the parties by reason of the fraudulent misrepresentations of the plaintiff as to material facts affecting the subject-matter of the lease.

Forcible Detainer.—Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

NEAL & WILEY, JAMES W. CRAIG and EDWARD C. CRAIG,
attorneys for appellant.

JAMES F. HUGHES, CHARLES BENNETT and F. M. PHIPPS,
attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF
THE COURT.

Appellee recovered judgment in forcible detainer against appellant for the possession of a strip of ground fronting

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on Broadway street in Mattoon. He produced in evidence a lease signed by himself and the appellant dated February 1, 1892, by the terms whereof appellant leased the premises in controversy from him for the term of one year and agreed to pay him fifty cents per month rent therefor. The lease contained the following stipulation:

“It is further agreed by the parties that in case a certain litigation now pending in the Coles County Circuit Court in the State of Illinois, between Rufus Noyes and said Heffernan, should be decided in favor of Heffernan, then the said L. C. Young hereby agrees to purchase or lease from the said Heffernan the said described seventeen feet of land.”

Demand for the payment of rent and refusal to pay was proven. Testimony produced by appellant tended to show that when he executed the lease, he was in possession of the premises as tenant of one Rufus Noyes; that he obtained possession from Noyes January 22, 1895, and was engaged in erecting a building upon the ground when appellee's attorney came and told him the ground was in litigation and that he must either execute a lease to appellee or stop his carpenters and workmen from proceeding further with the work of building the house, and that if he would execute the lease, the rent to be paid would be made light until the litigation came to an end and an agreement should be inserted securing to him the right to buy the ground or lease it if appellee prevailed in the court.

Appellant testified that he executed the lease because he believed the statement that the ground was involved in a suit at law, and in order he might proceed with the construction of his building without interruption and be protected against both litigants, and that he afterward learned there was no litigation pending involving the ground and refused to comply with the lease. Noyes testified there was no dispute pending about the land.

Counsel for appellee insist suit was pending and in support of the insistence cited us to the opinion of our Supreme Court in *Noyes v. Heffernan*, 153 Ill. 339, and appellant's counsel consent the opinion cited may be consulted.

We have examined the opinion referred to and find the premises involved in that case were not those here involved but thirty-four feet of ground adjoining upon the east.

The rule a tenant may not deny his landlord's title has no application if appellant was tenant of and in possession under Noyes when he executed the lease to appellee and was induced to execute the second lease by artifice or fraud. *Cox v. Cunningham*, 77 Ill. 547; 12 Amer. and Eng. Ency. of Law, 704.

It was competent for appellant to introduce parol testimony to support his assertion that he was induced to execute the lease by fraudulent misrepresentations of appellee as to a material fact affecting the subject-matter of the instrument.

If appellant entered into possession under Noyes and was his tenant, and was afterward induced by fraudulent and false statements of appellee, as claimed, to execute the lease relied upon by the appellee, he was justified in refusing to recognize and be bound by such lease.

Evidence tending to show such was the state of case was produced, but the instructions given by the court were so framed that this defense was not presented to the jury and that the right of appellant to be relieved of the obligation of the lease was declared to be dependent upon the question whether when he executed it he "abandoned his possessions under Noyes," to quote the words of the instructions.

His right was not so dependent if he was induced to abandon his position as tenant of Noyes by the artifice and fraud of the appellee.

The cause of the appellant was improperly prejudiced by this instruction and we are not satisfied but that it contributed to produce the verdict against him. The judgment is reversed and the cause remanded.

John W. Baker v. The Mansur & Tebbetts Implement Company, Assignee, etc.

1. **EXECUTION—Levy of—When Not a Satisfaction.**—The levy of an execution upon personal property of the debtor, of value sufficient to satisfy the debt, operates as a satisfaction for the time being, but if the levy is released by agreement and consent of the execution debtor, and the property is applied to other purposes, so that the fruits of the levy are lost to the creditor in consequence, there will be no satisfaction of the judgment and execution.

Motion, to recall an execution. Appeal from the Circuit Court of Clark County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

ROBERT E. HAMILL, attorney for appellant.

GRAHAM & TIBBS, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was a motion filed by J. W. Baker, the appellant, to recall and quash an execution issued upon a judgment entered in favor of one Webb for the use of Lee, assignee, etc., v. Forester & Laughrey and the appellant, which judgment the appellee Implement Co. held by assignment from Lee.

The grounds of the motion were:

1. That said judgment has been fully paid and discharged.

2. That as appears by the return of the sheriff of Jasper county upon a writ issued upon said judgment, there has been satisfaction of said judgment by the levy upon personal property of the defendants, Forester & Laughrey, sufficient to pay and discharge said judgment.

3. That said judgment has been fully paid and nothing remains due the plaintiff or his assignee thereon, and the writ in this cause issued was wrongly issued after satisfaction.

4. That said execution was improvidently and improperly issued.

The court entered a judgment that the motion be denied and Baker appealed.

The Implement Co. held by assignment from Lee a judgment against Forester & Laughrey and held also as collateral to secure this last mentioned judgment certain demands due to the judgment debtors from other persons and it collected the sum of \$193.73 or thereabouts from such persons.

Forester & Laughrey were also indebted to the Implement Co. upon an unsettled account in a considerable sum. The judgment to secure which the collateral demands had been pledged was settled, and the contention of appellant is, the sums collected from such collateral should be applied to the discharge of the execution and judgment in question.

The open account against Forester & Laughrey was settled by Forester at an agreed discount of somewhere near fifty cents upon the dollar.

Appellee insists that the amount collected upon the collateral was by them applied as a credit upon the open account and that the balance of such account was then settled at fifty cents on the dollar.

We find evidence in the record to support this view and also tending to show that the appellant, Baker, who is a relative of Forester, had full knowledge, and, in fact, assisted in bringing about the adjustment at a discount, of the open account due to the Implement Co. from Forester & Laughrey, and became the security of Forester on a note to the company for a portion of the amount agreed to be paid in that settlement, and that he then knew the amounts collected on the collateral claims had been applied to reduce said open account before it was scaled and settled.

There was a conflict of testimony on these points but the court accepted as having the greater weight, that favoring the view urged by appellee.

After consulting the evidence preserved in the record, there appears no reason why we should interfere with the conclusion thus reached by the court.

Village of Coffeen v. Lang.

Other testimony tended to show and fully warranted the finding of the court that the levy made by the sheriff of Jasper county upon the property of the execution debtors was released by the agreement and consent of such debtors and said appellant, Baker, and the property applied to other purposes than that of paying the judgment, and this with the knowledge and acquiescence of the appellant.

Nothing was offered in support of the fourth ground of the motion except in so far as the contentions we have disposed of were applicable to it.

The judgment is affirmed.

Village of Coffeen v. Permelia H. Lang.

1. SIDEWALKS—*Right to Use, Although Known to be Out of Repair.*—Notwithstanding the fact that a person has knowledge that a sidewalk is out of repair, he still has the right to travel upon it, if, in so doing, and under all circumstances, he exercises the care of a reasonably prudent person.

2. CITIES AND VILLAGES—*Notice of Dangerous Sidewalks.*—The question as to whether the officials of a city or village would have known of dangerous places in sidewalks, if they had exercised proper vigilance, is one of fact for the determination of the jury.

3. EVIDENCE—*Opinion of Witnesses—When Immaterial.*—After a witness had testified that he had frequently passed the place in question on the sidewalk, and had seen nothing wrong, what he thought as to whether he would have noticed the defect, if there, is wholly immaterial, and to ask for his opinion on the point is to violate a general principle in the law of evidence.

4. INSTRUCTIONS—*Married Woman's Loss of Time, etc.*—Conceding that the amount lost by reason of a married woman's inability to perform her usual duties during her illness resulting from an injury can not be recovered by her, yet an instruction which states that the jury may take into consideration her loss of time, and her pain and suffering, etc., is not substantially objectionable, especially where the damages assessed are not excessive.

Action, for personal injuries. Appeal from the Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLEY, Judge, presiding, Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

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LANE & COOPER, attorneys for appellant.

HOWETT & JETT, attorneys for appellee..

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$400 in favor of the appellee, in an action on the case, for injuries sustained by reason of a defective sidewalk.

The point first made in the brief of appellant is that the appellee did not exercise due care. She was carrying her child on one arm and had a small valise or satchel in the other hand. As she approached the defective place in the walk, her cape blew in the child's face, when it began to cry, and while she was giving it the necessary attention she stepped inadvertently on the end of the rotten board which was laid lengthwise, her shoe was caught by nails protruding from the stringer, and she was thrown down in such a way as to cause the injury complained of. She admits that she had noticed the condition of the walk when passing there on previous occasions. As was said in *Village of Cullom v. Justice*, 59 App. 304, "Notwithstanding this fact, she would have the right to travel on the sidewalk, if, in doing so and under all the circumstances, she was exercising the care of a reasonably prudent person, and this, like every other question of fact, was for the jury. This is a principle so well established that no authorities need be cited." S. C., 161 Ill. 372; *Village of Clayton v. Brooks*, 150 Ill. 77. The cases referred to by appellant are not necessarily in point here, for the reason that the facts are not identical. The appellee may well urge as an important circumstance, that her attention was necessarily diverted to the child, and while she was properly caring for it, the defective point was reached and she was hurt. It was for the jury to say whether the explanation she offered was credible and sufficient. We can not hold they erred in so accepting it. The next point urged is that the defect was not such as to render the village liable. It was enough to cause the injury in question. It was described as being a decayed

place at the end of the board where it was fastened to the stringer four to six inches in width—large enough to admit a human foot; the board would give down when stepped on, and there were protruding nails which caught the plaintiff's foot and contributed to produce the fall. Other persons had suffered inconvenience there—one of them said she had her foot caught there, but did not happen to fall; another stumbled there, but did not fall; another was tripped and did fall, cutting the toe of his shoe on the nails.

Other witnesses noticed the defect.

Quite a number of witnesses called by the appellant, frequently passed there and did not notice it. Still it was there, and had been for two months or more, and proved to be dangerous. It was for the jury to say whether the corporate officials would have known of it had they exercised proper vigilance, and we find no occasion to interfere with their conclusion in that respect.

Complaint is made that the court would not permit appellant to ask a witness whether he would have noticed the defect if it had been there. In view of what the witness had already stated as to his means of knowledge and his opportunity for observation, this question would have elicited his opinion merely, and the remark of the court in ruling on the point that such evidence was without weight, was, as we think, quite correct in view of the testimony. The witness had told all he knew; that is, that he had frequently passed there and had seen nothing wrong. What he thought as to whether he would have noticed the defect, if there, was wholly immaterial, and to ask for his opinion on the point was to violate a general principle in the law of evidence.

The case relied upon by appellant—Penn. Co. v. Boylon, 104 Ill. 595—was reversed because the trial court refused to permit several questions to be asked, one of which was in form much like the question excluded here, but the aspect of the testimony already given was peculiar and was especially so because of one clause of an answer just made by the witness. The court ruled, therefore, that under the cir-

cumstances the question should have been permitted. It is not clear that the judgment would have been reversed for that cause alone. Other cases may be found where similar cases have been approved, but it is believed that in every instance the circumstances were exceptional and that there was some special reason for deviating from the general rule.

As already observed in the case at bar, the witness had testified to all he knew on the point, had stated his opportunities for observation and it was for the jury to draw their own inference.

This objection must be overruled.

It is urged the court erred in giving instructions asked by plaintiff as to the damages.

The third and fourth were general; that if the verdict was for the plaintiff the damages should be assessed at such amount as the jury might believe from the evidence she was entitled to and that it was not necessary that any witness should have testified to any certain amount as the damages sustained, to which no valid objection is perceived.

The fifth was as follows :

“The court instructs the jury that if they shall find the defendant guilty they may then assess the plaintiff’s damages at such sum as the evidence may show, if anything, which she has actually sustained as the direct or proximate result of her injury, and the jury may take into consideration plaintiff’s loss of time and her pain and suffering, if such are shown by the evidence, and if the jury shall believe from the evidence that the plaintiff is permanently injured and is incurable, they may take that into consideration in assessing the plaintiff’s damages.”

The point made on this instruction is that it allows the plaintiff to recover for her loss of time and it is insisted on the authority of *City of Bloomington v. Annett*, 16 Brad. 199, that for time lost by the plaintiff her husband only could recover. The instruction, condemned in that case, stated as elements of damages the expense incurred during the illness of the plaintiff (a married woman living with her hus-

Village of Coffeen v. Lang.

band) including bills for nursing and medical services, and it was held erroneous, as was also the action of the trial court in admitting proof of what the services of the plaintiff as a housekeeper were reasonably worth.

In this case there was no proof of that sort, but it was shown that plaintiff was confined to her bed for seven or eight weeks.

The expression "plaintiff's loss of time" in connection with the other items, of pain and suffering, would perhaps be understood as referring to the length of suffering and her personal inconvenience thereby sustained, and not to the value of her services during that time, as to which there was no proof.

Hence, conceding the point that the amount lost by reason of her inability to perform her usual duties during her illness was not recoverable by her, as to which no opinion is expressed, the instruction is not substantially objectionable. On a broader ground, however, the objection may be overruled, that is, the damages are not excessive.

The plaintiff certainly suffered very severely as a direct consequence of the fall. She claimed and proved by medical testimony that the left fibula was broken, that the thigh, spinal cord and left shoulder were bruised and much affected; that she also suffered another serious injury, peculiar to her sex, and that she endured great pain for many weeks. True, some medical testimony was produced to the effect that there was no fracture and that all the other troubles were much magnified; in other words, that the trouble was in the main hysteria; yet hysteria is a most distressing ailment when acute and protracted, and if brought on by the injury in question, was proper to be considered in assessing her damages. In any view that can be taken of the evidence we are constrained to say that the sum awarded is clearly within the range of the proof, indeed, is a very moderate allowance, and the supposed fault in the instructions on that subject ought not to work a reversal. *St. L., A. & C. R. R. Co. v. Odum*, 52 Ill. App. 519; *S. C.*, 156 Ill. 78.

No other objections are urged, and the judgment will be affirmed.

William Seim v. Stephen F. Hale.

1. *LEASE—Of Personal Property, When Valid as a Mortgage.*—A lease of personal property given by a debtor to his creditor intended to secure his indebtedness, and containing a clause to the effect that the debtor should be permitted to purchase the leased property at any time upon the payment of a specified sum, is valid and effectual as a mortgage as between the parties to it without being acknowledged or recorded, but inoperative as to third persons, as long as the property remains in the possession of the debtor.

2. *ESTOPPEL—To Deny that a Person in Possession is the Owner of Property.*—The owner of property may so surrender the control and possession of it to another and so completely invest him with the *indicia* of ownership that he will be estopped to deny, as against the rights of third persons, that such apparent owner is not the real owner of such property.

Replevin.—Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

Instructions referred to in the opinion of the court :

2. “The court instructs the jury that a conveyance of property made in good faith to pay an honest debt is not fraudulent, though the debtor be insolvent, and the creditor is aware at the time of the sale that it will have the effect of defrauding other creditors in the collection of their debts.

4. “The court instructs the jury that if they believe from the evidence that the plaintiff was in possession of the property in controversy with the consent of John Lee and in consideration of the indebtedness of said Lee to the plaintiff prior to and at the time of the delivery of the execution to the defendant Siem, under which he levied on the said property, then they will find for the plaintiff.”

KEEFE & BUDD, A. N. YANCEY and PEEBLES & PEEBLES,
attorneys for appellant.

E. W. HAYES and RINAKER & RINAKER, attorneys for ap-
pellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF
THE COURT.

Appellee obtained judgment against appellant in replevin

Seim v. Hale.

for the return of a horse which the latter as constable had levied upon as the property of one Lee.

Appellee introduced in evidence three written instruments signed by himself and Lee which, in form, were leases of horses, carriages, etc., composing the stock of a livery stable which Lee was operating. These instruments were dated respectively, in 1892, 1893 and 1894, and each contained a clause to the effect Lee should be permitted to purchase the leased property at any time upon payment of a specified sum.

Lee was indebted to appellee in the sums mentioned in the leases at which he might purchase the property, and the instruments were intended to secure this indebtedness. They were not acknowledged or recorded.

Appellee claimed Lee delivered the stock of the livery stable (including the horse in question) to him in payment of the indebtedness which the leases were intended to secure, and that he, in good faith, accepted the property as such payment and received and had possession of it before the execution held by appellant was issued.

It was not necessary the leases should have been acknowledged or recorded in order to be valid or effectual as mortgages, as between appellee and Lee.

As to third persons they were inoperative as mortgages as long as the property remained in the possession of Lee. Sec. 1, Chap. 95, R. S.

But as to third parties were effectual, if the appellee reduced the property to his possession before any legal lien attached. *O'Neil v. Patterson*, 52 Ill. App. 32, and authorities there cited. Therefore it was that whether the horse was in possession of the appellee when the execution came to the hands of appellant as constable, becomes a controlling question of fact in the case.

The jury determined it adversely to the appellant.

We can not demonstrate from the testimony they were wrong and we find no error in the instructions which might have prejudiced the appellant upon that issue.

Lee and Ridgely were not partners. If the latter had

any interest in the horse, it was that of a joint ownership with Lee. It was wholly foreign to the case to inquire whether Ridgely had parted with his interest for the reason it was not disputed that so far as Ridgely was concerned, the appellee had sole possession of the horse under the claim he was sole owner thereof.

He could therefore invoke the aid of the writ of replevin against the appellant and have the property restored to his possession, if otherwise found entitled thereto as against the appellant. *Chaffee v. Harington*, 60 Ill. 718.

The owner of property may so surrender the possession and control of it to another and so completely invest such other with the *indicia* of ownership as that he will be estopped to deny, as against the right of third persons, that such apparent owner is not the real owner.

This principle of law was declared to the jury in the 2d and 4th instructions given for appellant.

The jury evidently did not think the facts proven, brought the case within the rule. They regarded appellee as the creditor of Lee until he became the owner of the horse in settlement of the indebtedness, and therefore properly regarded the principles contended for as not applicable to the case as made by the proof.

It is not complained the court refused or modified any instruction asked in behalf of appellant.

We have examined those given for appellee and considered objection preferred to them—and have found no error reversible in character.

The judgment is affirmed.

A. P. Benjamin v. William Beeler.

1. VERDICTS—*Upon Conflicting Evidence*.—A verdict rendered upon conflicting evidence under proper instructions is conclusive upon questions of fact.

Transcript, from a justice of the peace. Appeal from the County Court of McLean County; the Hon. C. D. MYERS, Judge, presiding.

Caldwell v. The People.

Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

WELTY & STERLING, attorneys for appellant.

J. J. MORRISSEY, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The record herein presents only a question of fact, whether a verbal undertaking entered into by the appellant to pay \$29 to the appellee was subject to a certain condition as claimed by appellant.

The jury found upon conflicting evidence and under instructions to which no objection is urged, the undertaking was not so conditioned.

We have carefully read the testimony. It is sufficient to support the verdict and there appears no reason to believe the jury were controlled or misled by passion, prejudice or mistake or that we should assume to declare their conclusion was palpably wrong.

The judgment is affirmed.

Joseph R. Caldwell v. People of the State of Illinois.

1. CRIMINAL LAW—*Bucket Shop—Intention of the Keeper Immaterial.*—Under the act to suppress bucket shops it is not necessary to show the intention of the keeper of the place to bring the business within the prohibition of the statute. It is no longer possible in this State, under any shift or device, however specious, to keep a place where parties may, under the pretense of buying or selling grain or other produce, engage in speculation in futures and gamble upon the rise and fall of the market.

Indictment, for keeping a bucket shop. Error to the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

GOVERT & PAPE and PENICK & WALL, for plaintiff in error.

A. AKERS, State's Attorney, for defendant in error; M. L. NEWELL, Assistant Attorney-General, of counsel.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was indicted for violating "An act to suppress bucket shops," etc. By consent a jury was waived and the issues were submitted to the court resulting in a finding of guilty and the imposition of a fine of \$200. Many objections are urged as to the ruling of the court in admitting and excluding testimony and in giving, refusing and modifying propositions of law. The mere statement in detail of all these objections would require much time and space.

We are of opinion the evidence clearly warrants the judgment of conviction, and conceding that some technical error may be found as to the admission of evidence, yet as the cause was tried by the court it must be presumed that only such evidence as was competent was considered. We find no substantial error as to evidence rejected. As to propositions of law no error appears. While many such propositions asked on behalf of plaintiff in error were refused, yet there is no just cause of complaint in that respect because all that was proper and necessary for consideration in them will be found in those held at his instance.

It is urged as error that the court refused to quash the indictment.

The abstract does not set out either count of the indictment in full.

From the very condensed statement of each count so given it is not apparent that any necessary averment was omitted.

The chief objection urged is that it is not averred that the defendant intended to commit the offense laid to his charge. This seems to be fully met by the view taken of the statute in the case of Soby v. The People, 134 Ill. 66.

Largent v. Aldridge.

The court say that the legislature evidently intended to close, suppress and prohibit the keeping of places where the practice of bucket shopping or gambling in the commodities named is permitted, and remark in conclusion: "We are of opinion that it is no longer possible in this State under any shift or device, however specious, to keep an office or other place where parties may, under the pretense of buying or selling grain or other produce, engage in speculation in futures and gamble upon the rise and fall of the market, and we have seen the legislature have, as they might, rendered it unnecessary to show the intention of the keeper of the office or place to bring the transaction within the prohibition of the statute." The construction thus put upon the statute answers in the main the objection taken to the sufficiency of the evidence. We are satisfied that the conviction is right and that no material error was committed. The judgment will be affirmed.

George B. Largent and William Reinhard v. Maggie Aldridge.

1. VERDICTS—*Upon Conflicting Evidence.*—When the question in issue is one of fact, the evidence conflicting, and there is credible evidence enough to support the verdict, if that opposed is not overwhelming in quantity or quality, the judgment will be affirmed.

Assumpsit, on a promissory note. Error to the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

SALMANS & DRAPER, attorneys for plaintiffs in error.

KIMBROUGH & MEEKS, attorneys for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT. The sole question argued in this case is whether the sig-

nature of Reinhard to the promissory note in suit is genuine. The jury found it was and the court overruled a motion for new trial. No error in the admission of evidence or in the giving of instructions is urged. Turning to the evidence as it appears in the abstract we find it is very conflicting—the volume on the one side being about equal to that on the other. Hence it was a question of credibility to a very great extent, and that was peculiarly one for the jury. Certainly there was enough evidence, if credible, to support the verdict, and that opposed is not so overwhelming in quantity or quality as to warrant a reversal.

The judgment must be affirmed.

German Insurance Company v. John W. Bates & Co., for use, etc.

1. **INSURANCE—Conditions of the Policy—Keeping Books.**—A condition in a policy of insurance that the insured should keep a set of books showing the record of his business, including purchases and sales, both for cash and upon credit, and providing that the policy should be void unless such books are kept, is not complied with by the keeping of a day-book and ledger, by the assured, in which accounts are kept with customers who purchase goods upon credit, although it may have appeared outside of the books from verbal testimony, that the money received by the assured from sales for cash was used to pay for goods purchased, and that the accounts kept with wholesale dealers from whom the purchases were made, would show the amount so paid.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Brown County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed November 21, 1896.

E. A. PERRY, attorney for appellant.

R. E. VANDEVENTER and A. HEDRICK, attorneys for appellees.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This case was before us at a former term. (Same v. Same, 60 Ill. App. 39.) We then reversed a judgment in the sum of \$990 against the appellant company, upon the sole ground the appellees had not complied with a provision in the policy which required that they should keep a set of books showing the record of their business, including purchases and sales, both for cash and credit, and providing the policy should be void unless such accounts were kept.

The case has been again tried and a judgment in the sum of \$700 rendered against the appellant company, and it has again appealed.

It is now contended that upon the last hearing it appeared from the evidence the appellees had complied with the provision.

The books of account kept by the firm, a day-book and ledger, were introduced.

It is not insisted these books contained a record kept for the purpose of showing the amount of sales of goods, made from the insured stock, either for cash or upon credit, but it is urged, accounts kept with customers who purchased upon credit and which appear upon the books, furnish a basis upon which the sales, not for cash, can be ascertained.

No cash book or cash account or account of sales for cash was kept, but counsel insist it appeared outside the books, from verbal testimony, the money received from sales for cash was used to pay for goods purchased and the accounts kept with wholesale dealers from whom such purchases were made would show the amount so paid. Hence it is argued the amounts sold for cash may be ascertained from the books.

We think not. If ascertained at all it must be from the verbal testimony. Moreover, the verbal testimony does not show that the cash received for goods sold was all applied to the purchase of new goods. The witness relied upon by appellants upon that point was a member of the appellee firm, and he admitted he used some money, taken in for

goods, in defraying his family expenses, that his partner did likewise and that some of such money was used for paying freight and express charges and for fuel and lights and clerk hire, etc.

It does not appear from this record the assured kept books of account as required by their undertaking as expressed in their contract of insurance.

We have no power to change the rules of law applicable to the right of recovery in such state of case. The judgment must be reversed and the cause will not be remanded.

Order for finding of facts.

The clerk will incorporate in the judgment the following finding of facts:

The court finds the appellee did not keep a set of books detailing purchases and sales of their stock of goods upon which they seek to recover insurance in the case, as they were required to do by the policy of insurance upon which the suit was brought.

G. R. Tilton, Administrator, etc., v. Gustavus Pearson.

1. JUDICIAL SALES—*When a Bidder May Decline to Complete his Purchase.*—A bidder at a judicial sale bids for the title of the decree or judgment defendant; and if, before complying with his bid, he discovers that the decree or judgment is inadequate to transfer such title, he may decline to complete the purchase.

2. REAL ESTATE—*Insufficient Description.*—A description of real estate in a decree of sale, as "Part of the west half of the northwest quarter of section nineteen, township twenty-one, range eleven, containing seventy-two acres, in Vermilion county," etc., can not be identified, and is therefore insufficient.

Assumpsit, for damages for failing to take premises on a bid at a judicial sale. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

LAWRENCE & LAWRENCE, attorneys for the appellant.

Tilton v. Pearson.

W. J. CALHOUN and H. M. STEELY, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellant, as administrator of the estate of Joseph Smith, deceased, by virtue of a decree rendered by the County Court of Vermilion County authorizing him to sell real estate which belonged to the deceased to pay claims against the estate, offered such real estate at public sale.

Appellee was the highest bidder therefor, and the property was struck off to him. He refused to comply with his bid and accept a deed for the premises.

The administrator resold the property, and brought assumpsit to recover the difference between the amount bid by the appellee, and that obtained at the second sale.

The Circuit Court held it was essential to the right to recover such difference that the bidder be first cited to appear before the court which rendered the decree, and there given opportunity to show cause for refusing to complete the purchase, and that an order be entered by such court directing a second sale to be made at the risk of such bidder.

Such seems to be the rule applicable to purchases of real estate sold by virtue of decrees rendered in courts in chancery. *Hill v. Hill*, 58 Ill. 239; *Thrift v. Fritz*, 101 Ill. 459.

The decree in the case at bar was rendered in the County Court of Vermilion County sitting in probate, upon the application under the statute of the appellant administrator for a decree to sell lands to pay debts allowed against the estate.

The statute provides the practice in such proceedings shall be the same as in chancery. Sec. 101, Chap. 3, R. S.

It did not appear from the declaration such preliminary steps had been taken, and for that reason the court sustained a demurrer and dismissed the action.

We think the declaration was insufficient. It averred the decree authorized the appellant to sell lots 10 to 21 inclusive, in the village of Myersville, and part of the west half of the

northwest quarter of section nineteen, township 21, range 11, containing seventy-two acres in Vermilion county, etc.

The particular seventy-two acres to be sold could not be identified by the description in the decree; and the decree was therefore insufficient to divest the heirs of the deceased of title thereto. A bidder at a judicial sale bids for the title of the decree or judgment defendant. If he discovers, before complying with the bid, the decree or judgment is inadequate to transfer such title, he may decline to complete the purchase. 12 Amer. & Eng. Ency. of Law, 229.

Even if a court of chancery would, upon notice to the heirs, correct the decree upon the application of a purchaser who had complied with the terms of sale, received his deed and entered into possession of the property in good faith, as to which we express no opinion, yet a bidder would have the right to decline to complete the purchase and accept a deed for the property.

The declaration alleged that at the request of appellee the appellant caused the seventy-two acres to be surveyed, and that he tendered a deed describing it by metes and bounds, according to the description thereof. The survey added nothing to the legal effect of the decree as against the parties to whom the title to the land descended upon the death of appellant's intestate.

The administration in the matter of an application for a decree to sell lands of his intestate occupies a position adverse to the parties who inherit the title to the land sought to be sold, and has no power to divest them of title except to the extent he may do so by executing the decree as granted by the court.

The judgment is affirmed.

Wm. B. McKinley v. Leona Goodman.

1. MEASURE OF DAMAGES—*Breach of Contract of Employment.*—Where a person is employed for a certain period, and is discharged without cause before the expiration of such period, if entitled to recover, the measure of damages is the agreed or contract price during the unexpired

McKinley v. Goodman.

period, less any sum such person has earned, or might have earned, by the exercise of a reasonable effort to obtain other employment in the same line or general nature of business.

2. EMPLOYMENT—*Duty of Employee Wrongfully Discharged*.—A person employed for a fixed period, at a particular avocation, if discharged without cause before the expiration of the time of service, is not required to hunt for employment in occupations different in their general nature and character from such avocation.

Assumpsit.—Wrongful discharge. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

Instructions referred to in the opinion of the court:

“The court instructs the jury that if you believe from the evidence that the plaintiff, Mrs. Goodman, was employed by the defendant McKinley, to work for a definite or fixed time, at an agreed price, then said defendant could not legally discharge her without her consent or some good cause until the expiration of such time, and if the proof in this case shows that the defendant did discharge plaintiff without her consent, or some good cause, then he is liable to her for the whole time covered by the original agreement, except what plaintiff might have earned, by the use of reasonable effort and diligence, during the unexpired time.”

“The court instructs the jury that a person being discharged from employment before the time of their employment expires, if such is shown by the evidence, they are not bound by law to hunt for other employment, only in the line of their business or profession.”

GERE & PHILBRICK, attorneys for appellant.

S. F. WHITE, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee, a resident of Champaign, whose business is that of a cook and caterer, was employed by appellant to run a lunch counter at Bay City, Mich. She claimed the contract was for a term commencing June 15th, and ending September 1, 1894, at \$75 per month, and that at the expiration of one month she was discharged without any reasonable cause. This action was to recover damages for breach of such alleged contract. She obtained judgment and appellant appealed.

It was contended by appellant, the appellee quit his service voluntarily and at her own request, but she and her son testified that she was discharged. Other witnesses, and a greater number, testified practically to the contrary, but it would be an assumption of the prerogative of the jury to hold they should have accepted the opposing witnesses as the more creditable or their testimony entitled to the greater weight.

While the action in such cases is not for work and labor done, but for damages for breach of the contract, yet the measure of the damages of the plaintiff, if found entitled to recover, is the agreed or contract price during the unexpired period, less any sum the plaintiff has earned, or might have earned, by the exercise of reasonable effort to obtain other employment in the same line or general nature of business. 2 Greenleaf, Evidence, Sec. 261, and notes. *Williams v. Chicago Coal Company*, 60 Ill. 154.

The instruction of the court to this effect is approved, and it was also proper to advise the jury, as was done in another instruction, that appellee was not required to hunt for employment in occupations different in their general nature and character from her avocation. *Williams v. Chicago*, *supra*; 5 Amer. and Eng. Ency. of Law, page 34 and notes. Whether it was required she should accept employment in other capacities, if offered, is not important to be determined, there being no testimony service in other lines was offered to her.

Other complaints are preferred to the instructions given for appellee, but only in minor and unimportant particulars, and are not well taken. The law bearing upon appellant's defense was fairly and fully presented by instructions given at his request. Accepting, as did the jury, the testimony in behalf of the appellee, we find it sufficient to support the verdict and judgment.

It was entirely competent for the court to correct the verdict in the presence of, and with the consent of the jury, as was done. Judgment affirmed.

Chicago, B. & Q. R. Co. v. Oliver Wingler, Administrator.

1. JUDGMENTS—*Entry of Nunc Pro Tunc, at a Subsequent Term.*—When the plaintiff is entitled to a formal judgment which, through some neglect or oversight of the court, or clerk, is not entered at the time, it may be entered *nunc pro tunc*, at a succeeding term.

2. PRESUMPTIONS—*Where an Appeal is Taken.*—Where an appeal from a judgment is taken, it may be presumed that a judgment was announced by the court and, if not entered by the clerk at the time, it may be entered at a subsequent term.

3. PARTIES—*Objections as to, Must be First Made in the Trial Court.*—An objection to a declaration that the names of the next of kin as parties are not properly stated in it, can not be made for the first time in the Appellate Court.

4. NEGLIGENCE—*Piling Ties in a Public Street.*—Leaving a lot of cross ties in a public street, so carelessly and improperly piled as to be dangerous, is an act of negligence.

5. SAME—*Of Parents and Children, a Question of Fact for the Jury.*—Whether a child, which was injured in playing about a pile of ties left in the public street was negligent, or whether its parents used due care in allowing it to play about the ties, is a question of fact for the jury.

Trespass on the Case.—Death from negligence. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

JOHN A. GRAY and WALKER & LANDAUR, attorneys for appellant.

G. L. MILLER, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1,500 against the railroad company for damages caused by the death of the appellee's intestate. The deceased was a child some four years of age, and his death resulted from the alleged negligence of the appellant in leaving a lot of cross ties in a public street, so carelessly and improperly piled, that while

the deceased was playing about the same, three of them fell off the pile upon him and fatally injured him.

It is first urged there is no valid judgment. As appears from the record the verdict was entered—motion for new trial denied—motion in arrest denied, and an appeal allowed at the trial term, but no formal judgment was then entered. At the next term an order was allowed that formal judgment be entered *nunc pro tunc*, as of the trial term.

In this there was no error. It is apparent that the plaintiff was entitled to a formal judgment and that through some neglect or oversight of the court or the clerk it was not entered. In such case it is proper to render judgment *nunc pro tunc*, at a succeeding term. As an appeal was allowed it may be presumed that a judgment was announced, though the judge's minutes do not show it; if it was not, then it was through the fault of the court, and this should not prejudice the plaintiff.

If, as may be presumed, judgment was announced but not entered by the clerk, then it was proper to enter it at a subsequent term, as of the trial term.

The next objection found in the brief is that the names of the next of kin were not properly stated in the declaration. It appears that at the time the suit was commenced the next of kin consisted of the parents and one sister, but that before the trial another child was born, and this is the ground of the objection. Assuming that there is anything of substance in the point it should have been made in the trial court, when the objection could have been obviated by amendment. It can not be made for the first time in this court. It is next urged that the verdict is against the law and evidence.

There is nothing in the proof to show that appellant had any right to pile its ties where this accident occurred. It appears that the railroad track is laid along a public street in the city of Canton, but whether this was by authority from the city, or if so, how much of the street was devoted to the uses of the railroad company is not shown. Hence, upon the proof the company was using a public street for the

storage of its ties, and if the ties were piled so as to fall down through the playful effort of a child of four years, it is difficult to see how the charge of negligence in that behalf can be denied.

To leave anything so dangerous in a public place is an act of negligence.

Whether the child or its parents used due care was a question for the jury. The street was public, and all persons had a right to resort there for proper purposes. We are not prepared to say that the parents were negligent in permitting the child to play there, and are willing to accept the conclusion reached by the jury on that point.

As to instructions given for plaintiff some objections are presented.

The first instruction was to the effect that the parents of the deceased were required to exercise only such ordinary care and watchfulness for his safety as would, under like circumstances, be exercised by ordinarily prudent and careful parents over a child of like age and disposition. The objection urged is that there was not sufficient evidence upon which to predicate it.

We think the point is not well taken. The objection to the second is that it told the jury it was for the court to determine and instruct what degree of care on the one side and negligence on the other would warrant a recovery, but did not do so. We fail to see the force of this objection. Other instructions which followed advised the jury fully as to these matters and it was not indispensable that the second or any particular instruction should do so. Nor do we see any fault in No. 2½, which merely announced that the deceased could be chargeable with only such care as might be expected of a child of his age.

The objection made to the third is that it permits the jury to pass on the question whether the pile of ties was used also by the public as a street or thoroughfare when there was no evidence to that effect, and that while it is stated that certain facts would show a license, the right of a licensee or the duty of the defendant toward such is not stated.

We think there was evidence on which to base the instruction, nor do we see that it was faulty in the respect suggested. It seems to be conceded in the brief that the objections urged to these instructions are cured by those given for defendant.

Turning to those we find them very full and complete on the points in which these are supposed to be deficient.

As to instructions asked by defendant which were refused, it may be said in brief that so much of them as was proper and necessary will be found in those given. Considering those given at the instance of the plaintiff and at the instance of the defendant and those given by the court of its own motion as a series, we find nothing of which the defendant could complain.

The law was therein stated with sufficient clearness and accuracy, and the only criticism we care to make is that the mass is too great, with unnecessary repetition and restatement of some points for which the defendant is somewhat to blame.

It is suggested that the conduct of one of the jury indicated undue bias, though it is admitted this is not sufficiently strong of itself to warrant a new trial.

The matter referred to was a remark made during an intermission. The court evidently regarded it as not significant and accepted the affidavit of the juror showing that he had not made up his mind at the time and that his remark was casual and careless, and not expressive or intended to be of any opinion or bias in regard to the case.

We think the court took a proper view of the matter.

The final objection is that a new trial should have been granted because of newly discovered evidence. The evidence so relied on is to the effect that the ties were disarranged by some persons who wished to stand on them for the purpose of looking over the adjoining fence of the Fair Ground, and that this was but a short time before the accident. This evidence would conflict with testimony offered by defendant as to the way the ties were left piled when a quantity was taken away on Thursday before the accident,

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and as to the condition in which they were found immediately after it.

It can not be said that the newly discovered evidence would be decisive, or probably so, of the result, and the court did not err in refusing a new trial on that ground. No other points are presented and the judgment will be affirmed.

Adolph Blumke v. Melinda Dailey.

1. JUDGMENTS—*When Not Void for Uncertainty—Interest.*—While section three of chapter seventy-four, R. S., entitled “Interest,” provides that when judgment is rendered upon a verdict, interest shall be computed from the time of the rendition of the verdict to the time of rendering the judgment on the same, and made a part of the judgment, yet a judgment is not void for uncertainty because the interest is not so computed.

2. PRACTICE—*Dismissal as to One Defendant—Effect on Pleadings.*—The dismissal of a suit as to one of several defendants, sued jointly, is to be treated as, in effect, striking from the declaration all averments against such party.

3. VARIANCE—*Questions of, Must be Raised in the Court Below.*—The question of a variance between the pleadings and the proofs must be raised in the trial court. It can not be made for the first time in the Appellate Court.

4. DECLARATION—*Defective Averments.*—Defective averments of a declaration should be specifically pointed out, either by demurrer or by a motion in arrest in the trial court, so that they may be there obviated by amendment or otherwise. Such objections can not be made for the first time in the Appellate Court.

5. NEW TRIALS—*Newly Discovered Evidence.*—Newly discovered testimony, which would have been useful merely for the purpose of contradicting the plaintiff, and not necessarily conclusive, is not sufficient to entitle a party to a new trial.

Trespass on the Case, under the dram shop act. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

ROWELL, NEVILLE & LINDLEY, attorneys for appellant.

R. D. CALKINS and S. P. ROBINSON, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

In this action the appellee recovered a judgment against appellant for \$350 under a provision of the dram shop law. The plaintiff alleged that the defendant sold intoxicating liquors to her husband, causing his intoxication, whereby she was injured in her means of support.

The first error assigned is that the judgment is void for uncertainty. It appears the verdict was rendered some two months before the entry of judgment thereon, which was in substance that the plaintiff recover the sum of \$350 with interest from the rendition of the verdict, but the amount of interest was not computed. By Sec. 3 of Ch. 74 R. S., it is provided: "When judgment is rendered on any award, report or verdict, interest shall be computed at the rate aforesaid from the time when made or rendered to the time of rendering judgment on the same, and made a part of the judgment."

The rate aforesaid is five per cent. While the judgment is not exactly formal, yet it is not void for uncertainty. *Id certum est quod certum reddi potest.* The amount of interest may be computed and added to the verdict and judgment may be entered for the total if the parties so desire, but there is no occasion to reverse on this account.

The next objection is that the evidence varies from the declaration in that it was alleged that the defendant and one Trimpster were engaged in the saloon business and furnished the liquor in question, whereas the proof was that the sales were made by defendant alone and not jointly with Trimpster. The case was dismissed during the trial as to Trimpster and proceeded against the appellant alone. This dismissal as to Trimpster was probably treated as, in effect, striking from the declaration all averments against him, and that was in substance the state of the record. No specific objection was made that the proof varied from the declaration in this respect, nor was there a motion to exclude. The point must be overruled.

The next objection is that the declaration is insufficient

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in not alleging that the plaintiff's husband squandered his money because he was intoxicated. The averment is that he became intoxicated and while so intoxicated squandered his money and that by reason of such intoxication and squandering his money plaintiff was injured in her means of support.

A more precise and definite averment would have been that while so intoxicated and in consequence of such intoxication he squandered his money, but whatever want of precision there is in this averment is cured by the verdict. Again, such defects should be specifically pointed out either by demurrer or motion in arrest, so that the necessary correction may be made. It has been held repeatedly under Sec. 24 of the practice act, that as such amendment may be made before final judgment is entered, it devolves upon parties to present objections of that nature in the trial court so that they may be there obviated, and the objection can not be made for the first time in this court. If, however, the proof failed to make out a material point, as to which there was also no averment, a different question would arise.

Another error assigned is that the court should have granted a new trial because of newly discovered testimony. This alleged matter would have been useful merely for the purpose of contradicting the plaintiff as to her habit and conduct in reference to the use of intoxicants, as to which appellant did introduce some testimony on the trial.

The evidence, so newly discovered, would not have been conclusive, necessarily, and according to our experience and observation very considerable deduction and discount should be made upon affidavits so produced, more especially when they deal with matters which, in their nature, are indefinite, resting largely in opinion, and recollection of events long passed and probably not much noted at the time of their alleged occurrence.

The defendant sought to prove that the plaintiff did not object but consented to the use of liquor by her husband, and in order to support that view and to avoid exemplary damages, tried to show that she sometimes used liquor and even went to defendant's place to get it, which she denied.

The jury heard all the testimony offered on the point, and if they had also heard what is contained in these affidavits it is by no means certain, or very probable, they would have concluded that she assented to the acts of the defendant in selling to her husband under the circumstances shown, or that they would have given her any less than they did in the way of damages.

It is objected that the first three instructions given for plaintiff are faulty because omitting to state the important condition to recovery that the plaintiff's injury in her means of support was caused by the intoxication of her husband.

Herein counsel seem to be under a misapprehension. The instructions do contain the condition, and the jury could not fail to understand this to be an essential element of the plaintiff's case.

Complaint is made of the fifth and sixth instructions because, as counsel assume, there was nothing in the evidence upon which exemplary damages could be predicted.

It is also complained that the court modified an instruction asked by the defendant to the effect that plaintiff could not recover more than actual damages by adding the qualification, unless the defendant acted willfully in furnishing the liquor. We can not agree with the position of appellant that there was no evidence upon which to predicate an instruction with reference to exemplary damages.

The proof tended to show that liquor was furnished to the husband when he was drunk and under circumstances which would raise a presumption of recklessness and willfulness on the part of appellant, and that more or less of this was after notice from the wife forbidding it.

It is assigned as error that the court refused certain instructions which assumed that it was necessary for the plaintiff to show that her husband was an habitual drunkard and that defendant knew it.

Averments to this effect were in the declaration, but it was not necessary to prove them. In torts the plaintiff may recover upon proof of a part of the charge if the averments are divisible and if enough is proved to make a case. 1 Chitty on Pl. 387.

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These averments were not essential to recovery, though they might have been proved, if true, in aggravation of the damages. The instructions were properly refused. So, also, were certain instructions predicated upon the theory that there could be no recovery, because there was no proof that Trimpter participated in making the sales, and also certain others which assumed there was a variance between the declaration and proofs. Nor was it error to refuse certain others which were mere repetitions of some that were given, to the effect that plaintiff could not recover for anything not caused by the action of the defendant.

Some exceptions are taken to the ruling of the court in admitting and excluding evidence. The matters referred to are minor in their character, and we deem it unnecessary to state them all in detail. We find no substantial error therein. On referring to the abstract and in some instances to the record, we are satisfied that the rights of appellant were not prejudiced. For example, the plaintiff on her cross-examination stated that the sales of produce from the farm and garden amounted to \$700, and that the items were all put down in a book that was kept at home. It is urged that this statement should have been excluded because it was, in effect, proving the contents of a writing by oral evidence.

The point is not well made.

Argument is pressed upon us that the verdict is grossly unjust in the light of the evidence, and that the jury probably included in this verdict something for damages which should have been charged to other saloon keepers against whom separate suits were brought.

This point was not permitted to become obscured before the jury, as we may infer from the fact that at the instance of defendant they were told in three different instructions that he was not liable unless for liquors sold by him.

On the whole we are not impressed with the view of counsel that the verdict is unjust; nor do we find any error of substance in the record of which appellant may complain. The judgment is affirmed.

Chicago & A. R. R. Co. v. Randolph P. Anderson, Administrator.

1. NEGLIGENCE—*Deviations from Established Customs Without Warning.*—When the servants of a railroad company, in violation of a long established and well recognized custom, back a train in and upon a coal track, and after putting it in rapid motion detach empty cars and allow them to move at a dangerously rapid rate of speed along such track, warning of the intention to deviate from such custom should be given by means of the bell and whistle.

2. VARIANCES—*Should be Pointed out Specifically.*—The objection of a variance is technical and should not be favored. A motion to exclude evidence on the ground of a variance between the proofs and the pleadings which does not indicate in what the supposed variance consists, but alleges only in general terms that a variance exists, is properly overruled.

3. WORDS AND PHRASES—“*Proper Precaution*” and “*Reasonable Care.*”—The use of the words “proper precaution” instead of “reasonable care” in an instruction in an action for personal injuries, although, perhaps, subject to criticism, is not error as misleading or warranting the jury in exacting the performance of any and every act which would have avoided the injury in question, especially where, in other instructions, only ordinary and reasonable caution, care, etc., are required.

4. SPECIAL INTERROGATORIES—*Submission of, When Properly Refused.*—The submission of a special interrogatory which calls for the finding of mere evidentiary facts is properly refused.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

RINAKER & RINAKER, attorneys for appellant.

A. N. YANCEY and PEEBLES & PEEBLES, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This case was before us at a former term. (Same v. Same, 55 Ill. App. 649.)

We then reversed a judgment rendered in favor of appel-

lee because upon the pivotal question of fact whether the decedent used ordinary care for his safety, we thought the instructions of the court invaded the province of the jury to the prejudice of the appellant company.

The case has been again tried and judgment awarded the appellee in the sum of \$4,600, from which this appeal.

The jury returned special finding to the effect the appellee's decedent had exercised due care.

We find in the record proof in support of the finding which was lacking in the record of the case when it was formerly before us.

In all other respects the testimony upon the last hearing was substantially the same as upon the first.

The facts are sufficiently stated in the former opinion, *supra*.

The contention of the appellee that servants of the appellant company, in violation of a long established and well recognized custom, backed the train in and upon the south end of the main coal track, and after putting it in rapid motion detached the empty cars, and allowed them to move at a dangerously rapid rate of speed along said main coal track, was amply sustained by the proof.

The testimony was such the jury were warranted in concluding notice or warning of the intention to deviate from the custom was not given.

Upon these points the case was so clearly made out it is not important to inquire whether the instructions were inaccurate in minor respects as insisted by counsel.

Counsel for appellant company insist the negligence charged in the declaration is the negligent management "of a certain locomotive steam engine and a train of cars thereto attached," and that the negligence sought to be established by proof was in detaching the cars from the train and allowing them to continue in motion, etc.

Hence it is urged it was error to overrule the motion to exclude the evidence upon the ground of a variance between the proof and the pleading.

The objection of variance is technical and not to be favored. *Stearns v. Reidy*, 135 Ill. 123.

The motion did not indicate in what the supposed variance consisted, but alleged in general terms only that a variance existed.

In *Lake Shore v. Ward*, 135 Ill. 516, the ground of the motion was, "the proof varies from the declaration," and our Supreme Court said: "It was incumbent upon the defendant to indicate and point out (in the motion) in what the variance consisted, so as to enable the court to pass upon the question intelligently, and also to enable plaintiff to amend her pleadings so as to make it conform to the proofs," and refused to consider the point.

Moreover, we do not think there was material variance in the case at bar.

The fact a train was in motion upon the track of the L. C. & N. Railroad, in the vicinity of place where appellee, decedent, was killed at the time of the occurrence, was part of the *res gestæ*, and testimony to establish that fact was improperly admitted.

The second instruction given in behalf of appellee required the exercise of "proper precautions and reasonable care," etc., on the part of servants of the appellant.

The criticism is that only "reasonable" care and caution was required, and that the use of the word "proper" in the sense of being an equivalent for the word "reasonable" was misleading and warranted the jury in exacting the performance of any and every act which, as it might afterward be seen, would have avoided the occurrence, whether a person, though exercising ordinary care and caution, would have performed such act or not.

In the abstract, perhaps, the criticism is not groundless, but it is not suggested nor does it occur to us anything appeared in the evidence to which the error might apply to mislead the jury.

In the other of appellee's instructions only "ordinary" and "reasonable" caution, care, etc., was demanded, and in the second of appellant's instructions the jury were specially charged as follows:

"2. The court instructs the jury that it is not enough to

justify the jury in finding a verdict for the plaintiff that it shall appear from the evidence that deceased was killed by cars of the defendant, or that, looking at the facts and surroundings in evidence after the accident, it can now be seen that something not done by the defendant's servants at the time might have avoided the injury. But if the jury believe from all the evidence in the case that defendant's servants at the time of the accident used due and ordinary care in the operation of defendant's train under the circumstances, then the verdict must be for the defendant."

And the fourth instruction in the same behalf, was as follows:

"4. The court instructs the jury that the defendant, while using the railroad track in moving cars thereon, was only bound to use reasonable care to avoid injuring persons and property of people being on and approaching its line of railroad. And if the jury believe from the evidence in this case that the defendant, by its servants, exercised reasonable and ordinary care in moving and managing the cars it was hauling, and to ascertain the condition of the switches before attempting to place their cars in position for the use of the Carlinville Coal Company, then it performed its whole duty and the jury will find a verdict for the defendant."

In view of these instructions, it would be but to question the intelligence of the jury to hold they might have been misled by the use of the word "proper," to understand that a degree of care greater than ordinary or reasonable care, was required of the servants of the appellant.

The court submitted three special findings to the jury and refused to submit nine others. Those refused, except the sixth, asked findings as to evidentiary facts merely, and were, for that reason, properly refused.

The sixth sought to have the jury answer whether "the servants of the appellant company used due care to stop the moving cars after they discovered a collision was probable."

A finding favorable to the appellant upon the question could not have availed to control the general verdict.

If the servants of the company were guilty of negligence

in putting the cars in rapid motion on the coal track, it could not be excused from the consequence of such neglect by showing its servants afterward used all due care, but without avail, to relieve appellee's intestate from the peril to which such negligence exposed him.

Fourteen instructions were given in behalf of appellant, and the law of the case for the defense fairly and fully stated in them.

Eight other instructions were asked in the same behalf, but were refused.

We have examined them and think the court ruled correctly in denying them.

Only one of them need be here noticed. By it the court was asked to advise the jury no duty to the deceased was imposed upon the railroad company to sound the whistle or ring the bell of the locomotive, but that such duty was only for the benefit of persons traveling upon the highway or street, and to warn them a train was approaching the crossing.

Counsel insist that the instruction is based upon the rule laid down in *Williams v. C. & A. R. R.*, 135 Ill. 491.

The ruling of the court in the case cited is that statutory negligence is not to be imputed to the company because of a failure to give the signals required by the statute when a train is approaching a highway crossing, except as to persons who are traveling upon the highway.

In the case at bar, the question, not depending upon the statute but upon the facts, was, whether due care required notice or warning that the train was about to be moved in upon the coal track, should have been given.

A convenient and the usual mode of giving notice or warning of the movements of trains, is by means of the bell and whistle.

Hence, whether the bell was rung or the whistle sounded, was proper for the consideration of the jury in arriving at a conclusion as to whether reasonable care had in fact been exercised by the servants of the company.

If given, the instruction could have served no other pur-

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pose than to mislead the jury to believe a failure to ring the bell or sound the whistle was not proper to be considered by them.

We think the case, as now shown by the testimony, is with the appellee upon the merits, and that no error of substantial character intervened in the trial of the cause.

The judgment is therefore affirmed.

William Jacobs v. W. H. Crumbaker and James W. Bechtel, composing the firm of Crumbaker & Bechtel.

1. **WARRANTY—*Sale of a Harvesting Machine—Waiver.***—The provisions of a warranty in the sale of a harvesting machine, “that if upon starting the machine it should not work well, immediate written notice must be given,” etc., are waived by a subsequent agreement that the purchaser should start the machine, and the sellers and an agent of the machine company would come and see that it was working properly, and if not, would remedy the defects, and by the fact that they did come, and acted upon such agreement without written notice.

2. **SAME—*When its Provisions Can Not be Invoked.***—The provisions of a written warranty, on the sale of a harvesting machine, that “continued possession of the machine” shall be deemed conclusive evidence that the machine “fills the warranty,” can not be invoked when such possession is continued with the consent of the vendors after the machine is found defective, and in order to allow them time to replace defective portions of the machine.

Assumpsit, for the price of a harvesting machine. Appeal from the County Court of McLean County; the Hon. C. D. MYERS, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 26, 1896.

STATEMENT OF THE CASE.

The judgment appealed from was against the appellant for the price of a binder purchased by him of the appellees in June, or July, 1894.

The machine was warranted as follows:

“All our machines are warranted to be well made and of good material, and to do good work with proper manage-

ment, when set up and operated as per printed directions. If, upon starting any one of our machines, it should not work well, immediate *written* notice must be given to the Walter A. Woods Harvester Co., at Chicago, Ill., and the local agent from whom it was purchased, and reasonable time allowed to get to it and remedy the defects, if any, (the purchaser rendering necessary and friendly assistance,) when, if it can not be made to do good work, it shall be returned, free of charge, to the place where received, and the payment of money or notes will be returned. Failure to immediately give notice as above, or continued possession of the machine, whether it is kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. No one has any authority to add to, or abridge, or change this warranty in any manner."

It appeared without substantial dispute the machine failed to comply with the warranty.

The appellant became aware of this on the first day when he attempted to harvest his oats, which was the same day he received it.

He did not notify the appellees because, as it appeared without contradiction, appellees agreed on the day he received the machine they would go to his farm on the next day and have an expert machinist accompany them and see that it worked properly.

They, and such experts, came on the second day in pursuance of the agreement and found it necessary to re-adjust some of the parts of the binder, which they did, or attempted to do, and went away with instructions to appellee to go ahead with it and it would work all right. He did as they directed. It still failed to operate properly, ran too heavily, dropped the bundles, failed to bind too many bundles, and cut the pinions of one or more of the wheels.

After trying it for the remainder of that and part of the next day, with no better success, appellant notified appellee in writing. Appellee Bechtel came to appellant's farm in response to the notice, examined the machine, found the pinion was cutting and had cut away considerably, and he told appellant he would telegraph for another pinion. Ap-

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pellant desired to know what he should do in the meantime with his oats; Bechtel told him to run the machine as much as it would run. Appellee telegraphed for another pinion and wheel, and appellant continued to use the machine.

The cutting away of the pinion and cog wheel continued, the machine ran heavily, so that extra teams were required, and full work could not then be done. The binder attachment seemed to be defective, at least failed to do the work properly, and many bundles were dropped unbound.

Appellant finally completed the cutting of his crop, and some time afterward appellee and the expert came with the new pinions and wheel. The machine was then under a shed on appellant's premises, and they removed the old pinion and put in the new one. Harvest was then over for that season. On September 22, 1894, appellee wrote to appellant and demanded payment of the price of the machine and appellant replied under date of September 24, 1894, he would not pay until he had an opportunity to try the machine but was willing it should be taken back.

Appellee answered as follows:

COLFAX, ILLINOIS, Oct. 11, 1894.

FRIEND JACOBS: I am somewhat surprised at your views about the binder; to be sure we guarantee your machine, and the company stands behind us. But you very well know one day's use of machine is considered an acceptance of same.

We have already paid the company for the machine and of course expect you to settle with us. If anything goes wrong with you next year the same will be made all O. K.

Resp. yours,

CRUMBAKER & BECHTEL,

By W. H. CRUMBAKER.

Appellee brought suit November 12, 1894. The cause was pending until August, 1895, when the judgment appealed from was rendered.

Appellant retained the machine and attempted to use it in the harvest 1895, but it failed as before. Appellee Bechtel was notified and was present, admitted it would not operate properly and he could not fix it but sent for an expert as before.

He wrote appellant the following letter :

COLFAX, ILLINOIS, July 13, 1895.

Mr. Wm. Jacobs.

DEAR SIR: I wrote the company this morning and telegraphed also to send man at once; will be out as soon as he comes; don't be afraid of hurting the machine; use it just the same as if nothing was wrong; it will be made right if it takes another machine. Yours truly,

J. W. BECHTEL.

The expert workman came, re-adjusted the machine and made such changes as he thought necessary but to no purpose. Appellant procured another machine with which to complete his harvest and hauled the one in question to the place from whence he got it and left it there. Appellee refused to receive it. The court ruled upon propositions of law as follows :

Refused: The court held as a matter of law that an attempt to remedy alleged defects in the machine in controversy which did not succeed during the harvest, and a further attempt to remedy such defects after the close of the harvest would in law be a waiver of the requirements to return the machine, and would authorize the defendant to retain the same until the next harvest under the original warranty.

Held: The court holds as a matter of law that an attempt on the part of plaintiffs to repair alleged defects in the machine in controversy after the close of the harvest season, and a request to the defendant to retain the machine and try it in the next harvest year, if made by the plaintiffs, would work an extension of the original warranty until opportunity to test the machine in the next harvest.

Held: The court holds that the fact that the plaintiffs went to the home of defendants on verbal notice and had experts from the factory come there to fix the machine in controversy in this case, was a waiver of any agreement there may have been to give written notice.

Held: The court holds as a matter of law that if the machine in controversy did not comply with the warranty, and

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that the plaintiffs were notified of that fact and failed to make the machine comply with the warranty, and if after the harvest closed they attempted to remedy the defect, then the defendant would have a right to retain the machine until it could be tried in the next harvest and the warranty upon the same would remain until such trial.

ROWELL, NEVILLE & LINDLEY, attorneys for appellant.

E. G. CREAMER and A. E. DEMANGE, attorneys for appellees.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

That the machine failed to fulfill the warranty was fully proven, and indeed not seriously controverted. The provision of the warranty, "that if, upon starting the machine, it should not work well, immediate written notice must be given," etc., was waived by the agreement that appellant should start the machine, and appellees and an agent of the machine company would come and see that it was working properly, and if not, would remedy the defects, and by the fact they did come and acted upon such agreement without written notice.

The provision of the same instrument "that continued possession of the machine shall be deemed conclusive evidence that the machine fills the warranty," can not be invoked when such possession was continued with the consent of the appellees after they found it to be defective, and in order to allow them reasonable time in which to procure new pinions or wheels, deemed by them necessary to make it operate, in compliance with their contract. Appellees did not obtain these needed new parts until the harvest of 1894 was over. The test of the binder contemplated by the warranty, was successful operation in actual work in the harvest field. It could not then be applied. Appellees had conceded the machine had not worked as warranted, and their several efforts to correct the defect had not succeeded.

Was appellant required to accept the act of appellees, in supplying another pinion and other wheels, and the belief of appellees, expressed to him, "the machine would operate successfully," as equivalent to an actual demonstration in the harvest field? We think not. He had the right to suppose it was appellees' desire he should retain the machine and give it another trial.

This, in answer to a written demand for payment, he informed them he was willing to do, or was willing the machine should be returned.

They replied by letter to the effect he had accepted the machine by using it for one day, and must pay for it, and rely upon their warranty that it would work according to the contract.

And such seems, from an examination of the propositions of law, held and refused, to have been the view accepted by the court.

A warranty may be so drawn that the party aggrieved must retain the property, and recover damages for its breach, but that is not true when, as in this case, the instrument, by its terms, gives the right to return the property and be relieved of all obligation to pay the price thereof.

A letter written by appellee under date of October 11, 1894, can not be construed otherwise than as a refusal to accept a return of the machine.

It relieved appellant of any present duty of hauling the machine back to their place and tendering it to them. He retained it until harvest was again at hand; notified appellees that he would again test it at actual work.

They attended and aided him in the effort to make it do, properly, the work it had been constructed and sold and warranted to do.

The result was as before; it failed to fulfill the warranty. He returned it, as he had the right to do. We think the finding and judgment against him was erroneous.

It must be reversed and the cause remanded.

Matheson v. Rolan.

E. J. Matheson et al. v. Wm. Rolan, for use of H. A. Royse.

1. **VERDICT**—*Warranted by the Facts and Circumstances.*—Where the facts and circumstances developed by the evidence are sufficient to warrant the jury in finding that the makers of a promissory note understood the purpose to be effected by its execution, and that the use made of it has been entirely consistent with such understanding, the judgment based upon the verdict will be sustained.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

W. G. COCHRAN, attorney for appellants.

HARBAUGH & WHITAKER, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was entered upon a note executed by the appellants payable to Wm. Rolan.

The principal, indeed, the only ground upon which reversal is seriously urged is, that the note was never delivered to Rolan or used for the purpose for which it was executed.

R. R. Matheson, one of the appellants, was indebted to Rolan, and also to one McDonald, and appellee Royse was his surety to each of said creditors.

Appellant E. J. Matheson was indebted to R. R. Matheson, and the latter desired to apply the demands against E. J., upon the indebtedness for which appellee Royse stood as surety.

To accomplish this it was arranged E. J., instead of executing a note direct to his creditor R. R., should make a note for the amount due said R. R. payable to Wm. Rolan, one of the creditors of R. R., and that the other appellants (including R. R.) would sign the note.

This was done, and the note was delivered to R. R., who

delivered it to Royse, and authorized him to use it in payment of or upon the claims of Rolan and McDonald.

But neither of them would accept the note, and by agreement between R. R. and appellee Royse, the latter discharged such claims, and was authorized by the former to hold and collect the note, to reimburse himself in part therefor.

The question presented to the jury was as to the power of R. R. Matheson to clothe appellee with the right to collect the note.

The court instructed the jury in effect he had such power, if it appeared from the evidence, at the time the note was executed it was fairly in the contemplation of the makers of the note, the instrument should be so used by said R. R. Matheson.

No objection was made nor exception taken to such instructions, and no complaint is urged in this court against the correctness of the legal propositions laid down by the court.

We may therefore pass upon the case as involving only a question of fact.

The testimony is not properly abstracted, but we have read it from the record, and think the facts and circumstances developed were sufficient to warrant the jury in finding that the makers of the note understood the purpose to be effected by its execution, and that the use made of it by R. R. was entirely consistent with this understanding of the parties.

The judgment accomplishes justice, and no error demanding its reversal being pointed out it is affirmed.

City of Litchfield v. Elizur Southworth.

1. PRACTICE—*Waiver of Demurrer—Defective Declaration.*—By pleading over, a defendant waives his demurrer and can not assign as error the action of the court thereon; but if the declaration is so defective that it will not support a judgment, the question may be raised by motion in arrest, or on error assigned in a court of appellate jurisdiction.

City of Litchfield v. Southworth.

2. SEWERS—*Cities—Due Care in Constructing—Negligence, When Inferred.*—When a city undertakes to build a sewer and compels the abutting property owners to pay the sums assessed against them for that purpose it becomes bound to use due care to so construct the sewer with reference to its size, and fall, and the inlets, that it will carry away the drainage for the designed district, and if, in case of the ordinary annual rainfalls the sewer proves to be insufficient, it may be inferred that there was negligence in the construction of the same.

3. SAME—*Extraordinary Floods.*—It does not devolve upon a municipal corporation when constructing a sewer to provide against such extraordinary floods as are not to be expected, but the heavy rains which occur every year, as a general rule, should be expected and provision should be made accordingly.

Trespass on the Case.—Damage by sewerage. Appeal from Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

JOHN P. GARDNER, attorney for appellant.

LANE & COOPER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
This was an action on the case.

The declaration alleged, in substance, that the city constructed a public sewer along the street in front of plaintiff's residence property, at the expense of the owners of abutting property, the assessment against the plaintiff being sixty dollars, which he paid, and that, by permission of the city, he connected a lateral sewer from his premises with said public sewer; that the city, in constructing said public sewer, negligently failed to give it sufficient fall, and permitted too many inlets thereto, so that the sewer was incapable of carrying away the drainage flowing into it, and thereby filthy water and sewage was backed up into the cellar of the plaintiff through his lateral sewer, doing great damage, etc.

A demurrer to the declaration was overruled and then a plea of not guilty was filed. A trial by jury resulted in a verdict for the plaintiff for \$225, upon which judgment was

entered, a motion for new trial having been denied. The city brings the record here by appeal. According to the evidence the plaintiff was subjected to great annoyance for three successive years, when, during hard rains, the main sewer was unable to carry all the water and drainage thrown into it, and the cellar under plaintiff's house was flooded with filth.

A valuable well near by was spoiled on the last occasion and had to be filled up. There is but little doubt that the plaintiff has been damaged to the amount of the verdict. At the instance of the city, the jury were instructed that the city would not be liable if the damages were caused by the faulty construction of plaintiff's connecting sewer, nor was it bound to provide against an extraordinary fall of rain, and if the sewer was large enough, and with sufficient fall and with inlets of sufficient size and number to carry off the usual and ordinary falls of rain in the territory designed to be drained, then the verdict should be in favor of the city.

The jury, therefore, must have found that there was no fault in the construction of the plaintiff's connecting sewer, and that the public sewer was not sufficient to drain the territory designed with the inlets, as provided in time of ordinary falls of rain. There was evidence upon which the jury might have so found, and the question is whether, in such case, the city is liable. It was the case in effect alleged in the declaration. By pleading over, the city waived the demurrer and can not assign as error the action of the court thereon; but if the declaration is so defective that it will not support a judgment, the question may be raised by motion in arrest, or on error assigned in a court of appellate jurisdiction.

When the city undertook to build the sewer and compelled abutting property owners to pay the sums assessed against them for that purpose, it became bound to use due care to so construct it with reference to its size, and fall, and the inlets, that it would carry away the drainage for the designed district, and if, in case of the ordinary annual rain-falls, the sewer proved to be insufficient, it might be inferred

Cottrell v. Cates.

that there was negligence in the construction thereof. By the exercise of due care in that behalf the drainage, under ordinary circumstances, could be provided for. It would not devolve upon the city to provide against such extraordinary floods as are not to be expected, but the heavy rains which occur every year, as a general rule, should be expected, and provision should be made accordingly.

In this case, for three successive years, the plaintiff's cellar was flooded, and it is not shown that the rains were in any sense extraordinary.

The jury have settled the questions of fact presented in the case upon evidence which seems to warrant their conclusion, and we find no erroneous ruling of the court contributing to the result.

The judgment will be affirmed.

Norman Cottrell et al. v. A. J. Cates.

1. **FREEHOLD—Perpetual Easements.**—A perpetual easement is a freehold in land, and this court is without jurisdiction to entertain an appeal concerning such an easement.

Bill for Relief.—Appeal from the Circuit Court of Logan County; the Hon. LYMAN LACEY, Judge, presiding. Heard in this court at the May term, 1896. Appeal dismissed. Opinion filed November 21, 1896.

STATEMENT OF THE CASE.

This was a bill in chancery, exhibited by the appellants.

The bill averred the appellee had, by contract in writing and under seal, granted appellants the right and privilege of entering upon a certain tract of land, owned by him, and clearing out, deepening, enlarging, or improving, in such manner and way as they should deem best, a natural water way, which crossed said tract of land, and forever thereafter keeping and maintaining said water way in good and proper repair, etc., and that appellee had subsequently for-

bidden appellants from entering said premises or exercising such privilege, but had ordered them to leave the premises, and prohibited them from doing the work aforesaid in and about such water way.

The prayer of the bill was, the court, upon final hearing, would decree that appellants should have the perpetual right to go on the premises and work and clear out and keep in repair the water way, channel, etc.

The court sustained a demurrer to and dismissed the bill, and the complainants appealed.

BLINN & HARRIS and WALLACE & LACEY, attorneys for appellants; W. N. COTTRELL, of counsel.

H. R. NORTHRUP and BEACH & HODNETT, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The question involved in the case is whether appellants have a perpetual easement in the lands of appellee.

A perpetual easement is a freehold interest in land. *Tinker v. Forbes*, 136 Ill. 234; *Goudy v. Lake View*, 31 Ill. App. 653.

Jurisdiction to entertain the appeal is in the Supreme Court, not the Appellate Court. The appeal must be, and is, dismissed.

Appeal dismissed.

Eliza Murray, Ex., et al. v. Abraham Brokaw, Adm.

1. MORTGAGES—*Release by Mortgagee on Payment—Application of the Statute*—Section 8 of Chapter 95, R. S., entitled "Mortgages," providing that every mortgagee having received full satisfaction of all sums due him from the mortgagor, shall at the request of the mortgagor, his heirs, legal representatives or assigns, enter satisfaction upon the margin of the record of such mortgage in the recorder's office, applies only when the mortgage debt is paid without foreclosure.

Murray v. Brokaw.

Action, to recover a statutory penalty. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

THOMPSON & DONAHUE, attorneys for appellants.

H. M. MURRAY, *pro se*.

ROWELL, NEVILLE & LINDLEY, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

These were actions to recover penalties provided by Sec. 8, Ch. 95, for failing to release mortgages after the same had been paid as alleged. The cases were tried by the court without a jury by consent, and the finding in each was for defendant. Judgment was entered accordingly. The mortgages in question were executed by John Murray, since deceased, in favor of John and Charles Ellsworth, also since deceased.

Bills to foreclose were filed and decrees were entered for the amounts found due.

These decrees were fully paid and acknowledgment of payment was entered upon the record of each decree.

The appellants insisted that satisfaction should also be entered upon the margin of the record of each mortgage, and after making a demand for such entry of satisfaction, brought these actions for the specified penalty. Waiving the question as to whether there was a tender of "reasonable charges" before the suits were brought, we think the judgments are correct upon the ground that the statute involved applies only when the mortgage debt is paid without foreclosure. When it is necessary to foreclose, and a decree is rendered for that purpose, the mortgage becomes merged in the decree and a satisfaction of the decree is all that is required. This we think is quite apparent from the language of the statute and from a consideration of the object in view.

The judgment will be affirmed.

John P. Keller and Bernard Sigg v. Lucy J. Lincoln.

1. **DRAM SHOP ACT—*Liability Under, Joint and Several.***—When damages for injuries caused by the sale of intoxicating liquors are sought to be recovered under the dram shop act, all those who have furnished liquors which contributed to create or to strengthen, or to keep up the habit of drunkenness, are liable both severally and jointly.

Action, under the dram shop act. Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

BEACH & HODNETT, attorneys for appellants.

S. L. WALLACE and E. C. Moos, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered against appellants, jointly, in an action brought by the appellee under the dram shop act to recover damages for injuries to her property and means of support occasioned by the intoxication of her husband, caused in whole or in part by intoxicating liquors sold or given him by appellants.

Appellants each kept a saloon, but were not partners, nor otherwise jointly interested in business. It was abundantly proven each of them sold liquor to the husband of the appellee many times in 1891, 1892, 1893 and 1894, and that he was an habitual drunkard during those years.

It is urged a joint judgment was wholly unwarranted—that only separate sales were proven—and that it did not appear any instance of intoxication of appellee's husband resulted from the combined intoxicating influence of liquors sold or given him by the appellants. But it was proven appellee's husband became and was an habitual drunkard, and that liquors furnished to him by the appellants, though at different times and different places, contributed to produce

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and continue this state of habitual intoxication, and that appellee was injured thereby.

When the damages sought to be recovered are for injuries occasioned by a single temporary fit of intoxication, to warrant a joint judgment, it is necessary it should appear, liquors sold at separate times contributed to produce the particular intoxication.

The statute, however, in express terms includes injuries resulting in consequence of habitual intoxication. When damages for such injuries are sought to be recovered, all those who have furnished liquors which contributed to create or to strengthen, or keep up the habit of drunkenness, are liable both severally and jointly. Consult *King v. Haley*, 56 Ill. 106.

It is perhaps true that testimony was admitted which related to injuries to appellee's means of support, which was barred by the statute of limitations.

The instructions given in behalf of the appellee were so framed as to restrict the action of the jury to injuries within the statutory period, and the testimony as to injuries within that period was quite sufficient to warrant the verdict and judgment.

We think the verdict and judgment right upon the merits, and that the record is free from error, reversible in character. The judgment is affirmed.

Drainage Commissioners of, etc., v. Zadock Loveless.

1. DRAINAGE COMMISSIONERS—*Failure to Keep Record, no Defense to Suit.*—In a suit against a drainage district based on orders on its treasurer, the district offered to prove by its records that no entry had been made authorizing the issuance of the orders or the work for which they were issued. *Held*, that such evidence is inadmissible, and that while it is the duty of the commissioners to keep a record of their official acts, persons dealing with them can not be deprived of what is their due because of the neglect of the commissioners to keep their records properly.

Assumpsit, on special and common counts. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

PEEBLES & PEEBLES and A. N. YANCEY, attorneys for appellants.

F. W. BURTON and ANDERSON & BELL, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$640.93 against the Drainage Commissioners upon certain warrants or orders issued by a majority of the commissioners directing the treasurer to pay the amounts named, "for labor on drain." The treasurer failed to pay when the orders were presented, and therefore action was brought against the corporate organization. The plaintiff declared in assumpsit specially upon the several orders and also filed the common money counts.

The case was tried by the court, a jury being waived, upon the issues raised by a plea of non-assumpsit to the whole declaration and a plea of the statute of limitations five years as to the common counts. The plaintiff offered in evidence the orders declared upon and proved their non-payment on presentation to the treasurer. The defendant offered to prove by the records of the district that no entry had been made authorizing the issuance of these orders, or even authorizing the work to be done for which they were issued, but the court rejected the offered proof.

The statute in relation to those organizations confers power upon them as bodies politic by their respective corporate names to sue and be sued, plead and be impleaded, contract and be contracted with. A clerk is provided who shall keep a record of all proceedings of the commissioners pertaining to the subject of drainage.

A treasurer is also provided who shall keep, in a proper book, accurate accounts of all moneys received and paid out.

City of Waverly v. Henry.

He shall pay out no money except upon the order of a majority of the commissioners, and shall carefully preserve on file all orders for the payment of money, etc. Hurd's Stat. 1893, page 581, Secs. 75-77, page 588; Sec. 105. Authority thus appears for the issuance of warrants or orders upon the treasurer, and it necessarily follows that the corporation may be held thereon in case of non-payment. The only question then is, whether a failure to make a record of the proceedings of the commissioners should invalidate the orders. In other words, can liability for one delinquency be avoided by proof of another? The commissioners have power to contract in reference to drainage and to employ labor in that behalf, and while it is their duty to keep a record of their official acts, that is a matter over which the person contracted with or employed has no control. He may presume that they perform their duty in that respect, but he can not be deprived of what is justly due him because of their neglect to do so. The orders or warrants are *prima facie* evidence of liability according to their terms—but of course whether held by the payee or by an assignee, the district would be permitted to show failure of consideration of other meritorious defense.

If the district were seeking to enforce some alleged right or authority, as, for instance, the appropriation of land for a drain or an assessment for drainage purposes, it would, no doubt, be bound to show by its records that it had proceeded regularly; but when called upon to pay a just obligation, it can not profit by its own wrongful neglect to keep the records required by law.

The judgment will be affirmed.

City of Waverly v. Helen M. Henry.

1. ORDINARY CARE—*What Does Not Conclusively Establish Want of.*—The fact that a person continued to travel upon a sidewalk after discovering it to be in a defective condition, does not *per se* establish negligence, nor does the fact that a safer and better walk might have been taken, conclusively charge such person with want of ordinary care.

2. INSTRUCTIONS—*Should Not Give Prominence to Inconclusive Facts.*—It is improper to give an instruction which gives prominence to an inconclusive and evidentiary fact.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

E. ETTER and JOHN A. BELLATTI, attorneys for appellant.

WM. A. CRAWLEY, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee, while passing along a sidewalk in the appellant city, was tripped by a loose plank in the walk, thrown to the ground and injured.

She secured judgment and the city appealed. It is conceded the walk was defective, but it is urged it appeared from the testimony appellee was guilty of contributory negligence. She did not reside in Waverly; had not been on the walk before and did not know it was defective before she went upon it. She was accompanied by her stepson and it is contended she submitted to his guidance and control as to the route they should take. He knew the walk was, in a general way, unsafe, and also knew they could, without inconvenience, reach their destination by a safer walk. It is urged he did not exercise ordinary care in going on the walk, that his negligence is to be imputed to her, and that she discovered, after they had proceeded a short distance on the walk, it was not safe, and was guilty of negligence in not leaving it.

Imputable negligence was not interposed, by instructions or otherwise, as a defense in the trial court.

There appears no reason why we should permit it to be raised for the first time in this court, and if there is, we see no ground upon which it can be successfully invoked.

The fact that plaintiff continued to travel upon the side-

City of Waverly v. Henry.

walk, after she discovered the defective condition thereof, did not *per se* establish negligence, nor did the fact a better and safer walk might have been taken, conclusively charge her with want of ordinary care. Clayton v. Brooks, 150 Ill. 97; Village of Cullom v. Justice, 161 Ill. 372.

These were evidentiary facts proper for consideration, together with all other circumstances proven in the case, in determining the ultimate fact, which was whether the plaintiff used ordinary care for her own safety. Clayton v. Brooks, *supra*.

The principle sought to be announced in instructions Nos. 2, 3 and 9, which were refused, was clearly declared in Nos. 1, 2, 3 and 4, which were given. Instruction No. 10 directed the attention of the jury to a mere evidentiary fact as being proper for their consideration in arriving at a conclusion as to whether plaintiff exercised due care.

The purpose most likely to be served by such an instruction is to create in the minds of the jury the belief the court regarded the fact thus singled out as entitled to special consideration and great weight.

This is to invade the province of the jury. An instruction which gives prominence to an inconclusive fact should be refused. Instructions 11, 12, 13, 14 and 15, were based upon the theory facts therein set forth precluded recovery. The case of Clayton v. Brooks, *supra*, is authority such facts are evidentiary merely, and therefore the court properly refused them.

The jury were properly instructed. The evidence presented fairly a question of fact whether plaintiff had exercised due care.

There is no ground upon which we should assume to declare the verdict was manifestly wrong. The judgment is affirmed.

67 410
91 201

Daniel W. Zinn et al. v. Mary J. Hazlett, Administratrix, etc., et al.

1. **ESTOPPEL**—*Party Claiming Dower in Property is Estopped from Denying that it is Real Estate.*—A widow, who is also the administratrix of her deceased husband's estate, who has treated certain property as real estate by claiming and obtaining dower therein in proceedings to sell the same for the payment of debts, is estopped from saying that it is not real estate.

2. **DOWER**—*Owner of, Must Contribute to Discharge Incumbrances.*—The land belonging to the estate of a deceased person was divided among his widow and heirs without reference to a mortgage covering part of the land assigned to some of the heirs. At a later date, other land, for the conveyance of which a bond for deed had been given, was sold, and the proceeds used by the widow, who was also the administratrix of her deceased husband's estate, in paying off the mortgage on the land which had been previously divided. *Held*, that the widow should be required to contribute to the discharge of such mortgage in the proportion the value of her dower bore to the total value of the land divided.

Objections, to report of administratrix. Appeal from the Circuit Court of Christian County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

A. M. CRAFTON and J. C. McBRIDE, attorneys for appellants.

In the adjustment of the accounts of executors and administrators, the County Court has equitable jurisdiction and may adopt equitable procedure. *Millard v. Harris, Exr.*, 119 Ill. 185; *In the Matter of the Estate of Joel Corrington*, 124 Ill. 363.

Where a widow joins in the execution of a mortgage and her husband dies, she must contribute her ratable share of the mortgage before she is entitled to dower. *Selb v. Montague*, 102 Ill. 446; *Nofts v. Koss*, 29 App. 301.

While it is true that the administratrix may pay off claims that have not been presented for allowance, she assumes the risk of having the same allowed in her account, and if any equitable reason exists why she should not have credit for

Zinn v. Hazlett.

the full amount of the claim, or any item thereof, then it is the duty of the court to reject such part of such account or item. *Millard v. Harris, supra*; In the Matter of Joel Corrington, *supra*; see also, *Walker v. Diehl*, 79 Ill. 473; *Lynch v. Hickey*, 13 Brad. 139.

FRANK P. DRENNAN, attorney for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The controversy in this case arose on the report of the administratrix of John A. Hazlett. Briefly stated, the material facts are as follows: In 1892, said Hazlett died intestate, owning lands in three different sections, aggregating 360 acres.

He had also the title to another tract of eighty acres, which he had sold on credit to one Rebecca George, to whom he had delivered a bond for a deed signed by himself and by his wife, the appellee, conditioned for a conveyance to said George on payment of the unpaid balance of \$3,300. Shortly before his death, he and his wife executed a mortgage on 120 acres of the first named tract, to one Helme, for the purpose of securing the payment of a promissory note of \$3,100, bearing seven per cent interest per annum, which mortgage conveyed the dower and homestead interest of the wife.

In due time after his death the wife was appointed administratrix, and in her inventory she included the obligation of said Rebecca George for the purchase of said eighty acres, as a part of the personal assets of the estate. Later, a petition for partition was filed in the Circuit Court by some of the heirs, against the widow and the other heirs, as to the 360 acres, but not including the eighty contracted to George, and a decree was entered approving the report of the commissioners assigning certain parcels to the widow for her dower and homestead estates, and dividing the residue among the heirs. No mention was made in the partition proceedings, of the mortgage to Helme.

The land so assigned to the widow did not embrace any part of that included in said mortgage.

Soon after this decree was rendered, an arrangement was made between said Rebecca George and the administratrix, by which the contract of sale was canceled and the note returned to the maker, who waived all claim on account of a cash payment of \$300, made when the contract was entered into, and thereupon the administratrix reported the matter to the County Court and inventoried the eighty acre tract of land as a part of the assets of the estate.

She also filed a petition for sale of said tract for payment of debts, the principal item of which was the said note secured by the mortgage to Helme, which note, with the mortgage, was then held by W. T. Vandever.

In that petition she claimed dower in the land, but asked that the sale should be free of dower, and that the value thereof might be ascertained and paid to her in money. An order of sale was entered according to the petition and the land was sold free of dower, for the sum of \$3,200.

Afterward she presented her report as administratrix, charging herself with money received from various sources, including the said sum of \$3,200, and asking credit, among other items, for \$3,451.48, paid in discharge of said note and mortgage, and also for the sum of \$405.60, which she claimed was the cash value of her dower interest in said lands which she had so sold as administratrix. Exceptions were filed by the heirs and by Daniel W. Zinn and others who had acquired interests in the lands affected by the decree in partition.

These exceptions, as originally presented, challenged the item of \$405.60, and three other smaller credits asked by the report. Subsequently an amendment to the exceptions was filed by leave of the court, objecting to the said item of \$3,451.48 paid on account of said note and mortgage. The matter was heard by the court and an order was entered sustaining in part the amended exception as to the item last mentioned, reducing it from \$3,451.48 to \$1,294.30, requiring the report to be amended accordingly and continuing the cause for final report.

From this order the said Mary Hazlett prayed an appeal

to the Circuit Court which was allowed, and the cause was afterward heard in the Circuit Court, where an order was entered approving the report, from which the present appeal is prosecuted by the heirs and owners of the lands embraced in the decree of partition.

The first question is, what was included in the appeal from the County to the Circuit Court. It will be noticed that there were separate exceptions to five different items of credit, and that the order of the County Court, in terms, affected but one of them, the amount paid on the note and mortgage, and did not refer to or dispose of the others, though perhaps the fair construction of the order is that it, in effect, overruled them.

Be this as it may, very clearly the appeal, which was by Mrs. Hazlett, carried up merely the item of \$3,451.48, and the exception thereto. *Millard v. Harris*, 119 Ill. 185. There was no appeal from the ruling on the other items, if indeed there was a ruling thereon, and so the question as to the credit of \$405.60 for the value of the dower interest in the eighty acre tract sold to George and not embraced in the decree of partition, was not before the Circuit Court and is not before this court.

As to the item embraced in the appeal for money paid to Vandever in discharge of the note and mortgage, the point is made by appellants, that it was the duty of the widow, if she wished to assert her right of dower in the land affected by the mortgage, to contribute her ratable share of the incumbrance, and the case of *Selb v. Montague*, 102 Ill. 446, is cited in support of the position.

On the other hand it is contended that the doctrine of that case is not applicable, because the widow is not asking for dower in the lands affected by the partition decree; that whatever was assigned to her, under that decree, she may retain, and that no question as to the propriety of that decree can arise here. In that decree, as already stated, there was no reference to the mortgage, and the rights of the widow and heirs were disposed of as though there was no such incumbrance. The widow was assigned her dower in

all the lands affected by the decree just as if they were not so incumbered, and while the parcels assigned to her did not embrace that included in the mortgage, yet it is obvious that she received her dower in the mortgaged land the same as the other. If the mortgage had been foreclosed, and the land therein conveyed had been appropriated to the payment of that debt, it would seem clear that according to the principle of *Selb v. Montague*, the heirs to whom that land was set off might have called on her for contribution, because she had taken other land (which otherwise they would have gotten in part) on account of her dower in that land. Turning now to the George land, it is to be remembered that it had been bargained by Hazlett, his wife also executing the contract for deed, and that the note held for the unpaid purchase money was listed as personal assets in the inventory, and properly so. When the arrangement was made by which that contract was canceled and the note returned, the land was inventoried in lieu of the note. Was the character of the item changed from personal to real by that transaction?

Whatever might be the conclusion on that point, when separately considered, it must be noticed that the administratrix, being the widow, has treated the property as real estate by claiming and obtaining dower therein in the proceedings to sell for the payment of debts.

She had also presented, and had allowed, a demand for the value of that dower, and she is estopped to say it was not real estate.

It follows that the land of the heirs has been appropriated to the payment of the mortgage debt, thereby relieving the mortgaged land of the incumbrance, so that in substance and effect she is enjoying her dower in that land without making any contribution whatever to discharge the incumbrance thereon.

Had the personal estate been sufficient to pay that debt it might have been so applied, and then the dowress would have been exempt from any liability on account of the incumbrance; but because the personalty was not sufficient the land has necessarily been resorted to and the heirs have

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paid the debt *pro tanto*, which is equivalent to a purchase by them of that interest in the estate which was held by the mortgagee, and which, of course, is paramount to the right of dower. Ordinarily the question of contribution arises when the widow asserts her dower in a direct proceeding against the mortgagee and the others interested in the estate.

But the principle must be the same, whether she proceeds directly or indirectly. Though she was not the complainant in the partition proceedings, and though the mortgagee was not a party, yet she received her dower in the mortgaged land by its equivalent in other land, and while obtaining dower in the eighty acre tract, the George land, she has applied the proceeds of that land to the extinguishment of the mortgage. She ought, therefore, to be charged with what would have been her equitable contribution to the amount which the George land has furnished in payment of the mortgage. The value of her dower in the mortgaged land should be computed, and then she should be required to contribute a proportion of the amount furnished by the proceeds of the George land, which should be the same proportion that the value of her dower bears to the entire value of the mortgaged land. *Nofts v. Koss*, 29 Ill. App. 301.

The amount so ascertained should be deducted from the credit of \$3,451.48 asked by the report.

The judgment will be reversed and the cause remanded for further proceedings, consistent with the view herein expressed.

**People of the State of Illinois ex rel. H. D. Fortune
v. The President and Board of Trustees of
the Town of Pleasant Hill.**

1. **MANDAMUS—Coercion of Municipal Corporations.**—It is not proper to coerce a town by mandamus to exercise jurisdiction over an alleged street, the existence of which it in good faith denies, where such writ, if granted, would expose the town to the hazard of liability in damages.

VOL. 67.] The People v. President, etc., Town of Pleasant Hill.

Mandamus.—Error to the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

WILLIAMS & WILLIAMS, attorneys for plaintiff in error.

MATTHEWS, HIGBEE & GRIGSBY, attorneys for defendants in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was a petition for a writ of mandamus commanding the president and trustees of the appellee town to remove a certain fence which, as the petitions alleged, had been erected upon and obstructed a street of the town.

The answer denied the *locus in quo* was a street of the municipality.

Upon a hearing the Circuit Court dismissed the petition.

It was developed by the testimony that it was a matter not free from doubt whether a street existed as claimed, and that the town, in good faith, denied the existence thereof.

It was not a case where, without the writ, there would be a denial of justice.

An appropriate and effectual remedy is provided by Secs. 221 and 222 of the Criminal Code. Resort to it would have brought into court the person who built the fence, the wrong-doer, if there was a street there. The writ of mandamus if granted would expose the defendant in error to the hazard of liability in damages.

The court correctly ruled it was not proper to coerce the town by mandamus to exercise jurisdiction over the alleged street. 14 Amer. and Eng. Ency. of Law, 206; Elliot on Roads and Streets, 517; State ex rel. v. Buhler, 90 Mo. 560.

The judgment is affirmed.

Town of Pleasant v. Michael Clannin.

1. QUESTIONS OF FACT—*For the Jury.*—Where the testimony was conflicting and it does not appear that the verdict was manifestly wrong, or was the result of passion, prejudice or mistake, it will not be disturbed.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

WILLIAM A. BABCOCK and HARRY M. WAGGONER, attorneys for appellant.

M. P. RICE, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action under the statute to impose a fine upon appellee under the charge he had obstructed a public highway, by, as it was alleged, constructing a fence within the limits thereof.

He contended the fence was on the boundary line of his premises and the highway. The jury decided the question in his favor. The township appealed and asks reversal upon the sole ground the verdict is against the evidence.

We have read the testimony produced to the jury and considered the arguments (oral and printed) of counsel. The testimony was much in conflict; it was the peculiar province of the jury to determine the truth of the controversy. No reason appears why we should regard their findings as manifestly wrong, or to have been the result of passion, prejudice or mistake. The judgment is affirmed by the operation of the familiar rule applicable in such cases.

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**Edward O. Smith et al. v. Sarah L. Knox Goodrich,
etc.**

1. **DEEDS**—*Deposit of, in Escrow to Secure Payment of Note—Rights of the Parties.*—A deed was deposited in escrow with the understanding that it should not be delivered until a note for the balance of the purchase price of the land therein described was paid. *Held*, that such condition was for the security of the payee of the note, and that he might order that the deed be delivered at any time without payment of the note, or transfer the note to any one, and deliver the deed, if the holder of the note consented such course might be taken.

2. **FILING**—*What Amounts to.*—The delivery of a claim to a county clerk for the purpose of exhibiting it as a claim against an estate, constitutes filing and exhibition thereof to the court, though the clerk may neglect to note the fact upon the claim.

3. **PRACTICE**—*When Objection to Jurisdiction of Equity Can Not be Raised on Appeal.*—The decree of a court of chancery rendered in a case involving the affairs of an estate, which was fully litigated by the parties without objection to the jurisdiction, can not be held for naught in a court of review, upon the ground that the court had no power to hear and determine the matter.

Bill for Partition.—Intervening petition. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

BUNN & PARK and W. C. OUTTEN, attorneys for appellants.

W. C. JOHNS, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Under a decree entered in a proceeding in chancery for the partition of the real estate of one E. O. Smith, deceased, to which proceeding the heirs of said deceased were parties, the master in chancery sold certain of such realty and had in his hands funds arising from the sale.

The Circuit Court on the petition of appellee entered an order directing the master to appropriate a portion of such

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funds to the payment of a claim held against the deceased by the appellee. This appeal questions the correctness of this order.

Appellee's claim is based upon a note executed by said E. O. Smith, deceased, to John C. and Edward Coleman for \$2,500, being the unpaid balance of the purchase price of a lot in San Jose, Cal. The note and a deed executed by the Colemans conveying the lot to the deceased, were deposited with one Williams in California with the understanding the deed should not be delivered until the note had been paid. Said E. O. Smith, deceased, and Kathereyne S. Smith, his wife, entered into the possession of the lot; he built a residence thereon and they occupied it as, and it became, and was, at the time of his death, their homestead under the laws of the State of California.

After his death, the appellee, who it is claimed was acting at the instance of and collusively with the widow of E. O. Smith, paid the amount due on the note and it was assigned by the Colemans to her. At the same time the deed for the lot was surrendered by the depositary in escrow and spread of record in the proper office in California. The premises were then, by virtue of proper proceedings under the laws of that State, relating to homesteads, set off in fee to the widow of said deceased as her homestead. Judgment was entered on the note against the estate in favor of appellee in the Probate Court in Santa Clara county in California, but aside from the homestead property before mentioned, there was not sufficient assets in that State to pay the judgment. The appellee thereupon sought to have property in Illinois, of which the deceased was the owner at the time of his death, applied to the satisfaction thereof. The administrator in Illinois had not funds to pay it, and therefore appellee applied to the Circuit Court for an order upon the master.

The condition of the deposit of the deed in escrow, that it should not be delivered until the note had been paid, was solely for the security of the Colemans, and it was entirely competent for them to order the deed to be delivered at

any time without payment of the note, or to transfer the note to any one and deliver the deed, if the holder of the note consented such course might be taken.

Had the deed to the lot been delivered and the note secured by mortgage, clearly, it would have been lawful for the administrator to have treated the indebtedness, evidenced by the note, as in nowise different from other claims against the estate, and to pay it out of the assets if presented for payment and allowed, and this would have been true whether the mortgagee or his assignee held and presented the note, and also though its payment released the lien of the mortgage and left the homestead property free from incumbrance.

The arrangement whereby the deed was deposited in escrow created an equitable mortgage or lien upon the lot, and the situation and rights of the parties hereto were the same as they would have been had a mortgage to secure the notes been executed by the deceased in due form of law. The purchaser of the note was not more bound by any rule of law or equity to rely first upon and enforce his equitable lien than he would have been to enforce the lien of the mortgage, had such security been given.

The contention the appellee was bound to carry out the conditions of the escrow by leaving the note on deposit with the deed until the note should be paid is not tenable. As before remarked, this condition was for the benefit and security of the holders of the note. They had full right so far as the heirs of the deceased were concerned (and the interests of the creditors are not here involved), to surrender this special security and rely upon the general assets for payment. So far as the heirs are concerned the widow was entitled to have the homestead free from indebtedness incurred in purchasing or making improvements upon it, if the assets of the estate of the husband were sufficient to discharge such indebtedness.

Appellee's claim was delivered to the county clerk of Macon county, Illinois (being the county in Illinois wherein administration on the estate of the deceased was pending),

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within the time required by the statute, and at the same time the claims of other persons against the estate were also delivered to said clerk.

These claims were inclosed in one wrapper and the clerk placed his file mark upon the wrapper only. The delivery of the claim to the county clerk was for the purpose of exhibiting it as a claim against the estate, and such delivery constituted "filing" the claim with the clerk and an exhibition thereof to the court, although the clerk may have neglected to note the fact in writing upon the claim. Moreover, the notation by the clerk on the wrapper which inclosed this and other claims, might very properly be held to be a filing of each of the claims.

The jurisdiction of the Circuit Court in chancery sitting to adjudicate upon and direct payment of the claim can not be raised in this court for the first time. Jurisdiction of the administration of estates was originally in courts of equity, but in this State, in view of the creation by statute of courts of probate, it has become the practice, amounting almost to a rule in courts in chancery, not to assume to exercise such jurisdiction except in cases when the power of the courts of probate is inadequate.

But the decree of a court of chancery rendered in a case involving the affairs of an estate which was fully litigated by the parties and without objection to the forum can not be held for naught in a court of review upon the ground the court had not power and jurisdiction to hear and determine the matter. It is argued the jurisdiction of the court is raised by certain averments in the answer to the petition of appellees.

The averments referred to are only to the effect the claim is inequitable and barred, because not exhibited within the time limited by the provisions of the statute. Nothing otherwise in the record indicates the appellants question the power of the court to hear and determine its contention.

The only objection pointed out in the brief to the admissibility of testimony received by the court in support of the claim is that it was incompetent under the ruling of the

Supreme Court in McGarvey v. Darnell, 134 Ill. 367. In that case it was ruled the transcript of a judgment of the Probate Court of another State allowing a claim against an administrator in that State was not competent to establish the claim exhibited against an administrator appointed in and under the laws of this State to administer upon assets here.

In the case at bar the note of the deceased was produced in evidence, and it and the transcript of the judgment rendered in the court in California constituted the evidence of the right of appellee to recover.

We think the decree is right upon the merits and the record free from error. Decree affirmed.

**John Bennett, impleaded with David A. Baird et al.,
v. Emily F. Baird.**

1. PRACTICE—*What Bill of Exceptions Should Show.*—It can not be assigned for error that the trial court refused a change of venue where it does not appear from the bill of exceptions that any notice of the application for such change was given. A copy among the orders and files of the case of a paper purporting to contain such notice and service thereof is not sufficient.

2. PLEAS—*Effect of Amendment of Declaration Upon.*—Where three defendants are declared against jointly, one of them files a plea denying joint liability, and the case is subsequently dismissed as to another, and the declaration amended so as to declare against the two remaining defendants only, the plea will be regarded as denying no more than is alleged by the declaration as amended.

3. LIMITATIONS—*What is Not New Cause of Action.*—Where a suit is dismissed as to one of several defendants who have been sued on an alleged joint liability, and the declaration is amended to correspond, it is proper to refuse to permit the defendant to file a plea of the statute of limitations, predicated upon the theory that a new cause of action was set up by the amended declaration.

4. SAME—*Effect of the Execution of Note for Interest.*—The execution of a note, being interest for the amount of the interest due on another note, the transaction being regarded by the parties as a payment, and the original note being credited accordingly, will be regarded as a payment, and will operate to bar the statute of limitations.

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Assumpsit, on a promissory note. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

LAWRENCE & LAWRENCE, and Wm. A. YOUNG, attorneys for appellant.

SALMANS & DRAPER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This controversy has been here twice before. (53 Ill. App. 211, 61 Id. 72.)

On the last trial the plaintiff recovered against Baird and Bennett the amount due on the note, \$1,976.88, and the latter prosecutes the present appeal. It is assigned as error that the court refused a change of venue asked by Bennett and Green. It does not appear from the bill of exceptions that any notice of the application was given. The clerk has copied, among the orders and files of the case, a paper purporting to contain such notice and service thereof, but it can not be so preserved.

The point must therefore be overruled.

Another assignment is that the court permitted the default of Baird to be set aside. This can not be the subject of complaint by the appellant; but if it could, such action of the court was discretionary, and there is no reason to say the discretion was abused.

The third error assigned is that the court sustained the motion of Green for an involuntary non-suit as to him. We have twice held that his plea of the statute of limitations was supported by the proof; hence, he was entitled to judgment. It appears from the abstract that when the plaintiff's case was closed a motion was interposed on behalf of Green for an involuntary non-suit, whereupon the plaintiff asked leave to amend the declaration so as to declare against Baird and Bennett only, and dismiss as to Green, which leave was granted, and the suit was dismissed as to Green. The declaration was amended by interlineation and the court ordered the same to be refiled.

A dismissal of the suit, merely, was less than Green was entitled to, but he is not complaining, nor can the objection be made for him by Bennett. Just what amendment was made to the declaration is not disclosed by the abstract but presumably it was appropriate. The defense of Green was personal to himself and did not interfere with the right of the plaintiff to proceed against the other defendants, nor can the appellant insist that his plea denying joint liability should be found for him. When Green was dismissed the plea was to be regarded as denying no more than was then in effect alleged by the declaration that Baird and Bennett jointly promised, and that Green had such personal defense.

Neither was it error to refuse to permit appellant to file a plea of statute of limitations predicated upon the theory that a new cause of action was set up by the amended declaration. It was but a re-statement of the original cause of action so far as appellant was concerned. Nothing new had transpired. The non-liability of Green had indeed been established upon a defense personal to him which left appellant liable to plaintiff jointly with Baird, and severally for the full amount of the note, but it is not apparent how any new cause of action, so far as the plaintiff was concerned, was thereby developed.

It is inconceivable that the sustaining of this personal defense of Green could operate to relieve the appellant as against the plaintiff in the way suggested.

Objection is made as to the exclusion of testimony offered by appellant as to which note was shown him by Lindley, the attorney of plaintiff, and what Lindley then said about it.

It is not very clear what this evidence would have amounted to nor how the plaintiff ought to be prejudiced by what might have passed between her attorney and the appellant in her absence, but the appellant seems to have labored under a confused impression that the note shown him by Lindley was not the note in suit but another and quite different one. However, Lindley afterward came on the stand and testified distinctly that the note sued on was

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the only one he or his firm ever had. As the appellant made no further offer of proof on the point it is to be inferred that he was satisfied, and that he abandoned the position previously taken or suggested by him in that regard.

Another assignment of error is the admission of the \$206 note because it did not amount to payment, and was nothing more than a promise to pay, and therefore did not operate to bar the statute of limitations. This transaction was intended and treated by the parties as a payment, and the original note was so credited. It was expected that the note thus given would shortly be taken up by a brother of Baird, who had ordered a buggy from the shop, but for some reason he did not get the buggy and did not pay the note. This explanation of the reason for giving the note was not brought to our notice heretofore, but without explanation, the transaction would have the same effect as though the money had been paid by Baird and Bennett to the plaintiff and by the latter loaned back to them. By it the creditor received an independent and distinct obligation for the payment of the interest with interest thereon.

Without it the interest then accrued would have borne no interest, and this circumstance alone was enough to make the note in substance and fact a new undertaking, so that holding both notes the plaintiff could enforce the original only to the extent of the principal and interest accruing after the date of the new one.

The law will, therefore, treat the transaction as the parties treated it—as a payment.

No error is perceived in the admission in evidence of the contract between Bennett, Baird, Green and Miller and the letter of appellant. These tended to throw some light upon the matter in dispute, and being relevant, were admissible.

The principal question of fact was whether, assuming that the giving of the original note was not within the scope of the partnership agreement, it was given with the knowledge and consent of all the parties for money loaned by the plaintiff, and used by them in furtherance of their joint enterprise.

On this point the evidence, though conflicting, was sufficient to support the verdict, the jury having fairly exercised their peculiar province of determining to which witnesses the greater credit should be given.

Another and scarcely less important question of fact was whether appellant authorized the giving of the interest note. Here, too, the jury had to settle a conflict of evidence.

On both points the proof offered by the plaintiff was sufficient of itself to support the conclusion reached, and though it was opposed by that offered on the part of appellant we find no sufficient reason for saying that the verdict should be set aside.

The position of plaintiff is not so strange or unreasonable as to excite suspicion aside from the fact that she is the sister of defendant Baird, by whom the business was mainly transacted.

No doubt this circumstance was duly pressed upon the attention of the jury and they were led to scrutinize the oral testimony with proper care and caution. At least this is to be presumed. It is also to be presumed that this consideration and all others fairly involved were urged before the trial court on the motion for new trial and that the whole subject was fully discussed.

We can not settle such a dispute any better than that court and jury; on the contrary, as has so often been held in like cases, we are less favorably situated for that purpose.

In this dispute is involved the whole controversy. No objection is specifically made to the ruling of the court in the matter of instructions.

The brief calls attention to the refusal of the court to give an instruction asked by appellant as to the execution of the note without pointing out the propriety of the instruction.

On turning to the abstract we find that the court properly modified the instruction so as to include the idea that defendant might be liable, though he did not personally sign the note, if he authorized another to do so for him, and gave it as so modified. It is suggested also, that five other in-

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structions asked by appellant, which the court refused, should have been given. They are not set out in the brief, nor their substance stated, but we have referred to the abstract and find all that was pertinent or necessary contained in them is embraced in others that were given. The law applicable seems to be fairly and sufficiently stated in the series given at the instance of both parties and one which apparently was by the court of its own motion.

The judgment will be affirmed.

J. C. Maloney and Kate V. Maloney v. Melinda Dailey.

1. **INTOXICATING LIQUORS—Responsibility for Intoxication—A Question for the Jury.**—In a suit against a saloon-keeper for causing the intoxication of plaintiff's husband, it appeared that the husband became intoxicated in the defendant's saloon and while in that condition went to a place some distance from his home where he obtained more liquor and continued his debauch for several days, and that plaintiff sustained expense in going after him and bringing him back. *Held*, that it was a fair question for the jury how far the defendant was responsible for this debauch.

2. **SAME—Conclusions as to Cause of Intoxication Objectionable.**—In a suit against a saloon-keeper for causing the intoxication of plaintiff's husband, the husband should not be asked whether the intoxication relied upon was the same one upon which plaintiff had recovered against another defendant. It was for the jury to determine that question after hearing the facts as they occurred, and the conclusion of a witness is objectionable.

3. **SAME—Injury to Means of Support—What Proper Proof of.**—In a suit against a saloon-keeper for causing the intoxication of plaintiff's husband, evidence that the husband failed to pay his rent and that he had borrowed money to pay for treatment for the liquor habit, shows that his estate was wasted and that he was involved in debt by his appetite for drink and thus directly tends to prove that plaintiff was injured in her means of support.

4. **SAME—Injury to Means of Support—Consent to Sale Not a Bar to Recovery.**—In a suit against a saloon-keeper for causing the intoxication of plaintiff's husband, a statement by the plaintiff to the defendant that she did not care if her husband got liquor of him, if he (the husband) did not get too much, does not bar an action for actual damages caused by such intoxication.

5. *SAME—Injury to Means of Support—What May be Considered.*—In a suit for causing the intoxication of plaintiff's husband, an instruction which advises the jury that a wife may be injured in her means of support where her husband's ability to furnish her with the comforts of life is lessened or destroyed, although she may not be deprived of the bare necessities of life, is substantially correct.

6. *INSTRUCTIONS—When Technical Inaccuracies Not Objectionable.*—A mere technical inaccuracy in an instruction upon a point not in dispute will not vitiate the judgment.

7. *EVIDENCE—Will Not be Excluded Because it Reflects upon a Party to the Suit.*—Plaintiff will not be debarred from giving the details of an act complained of, because by so doing the defendant would appear to be guilty of an infraction of a statute not relied upon for a recovery, and thus the jury might be prejudiced against him.

Trespass on the Case, for causing the intoxication of plaintiff's husband. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

LILLARD & WILLIAMS, attorneys for appellants.

R. D. CALKINS and S. P. ROBINSON, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the appellee against appellants for one hundred dollars. The cause of action alleged was that appellee had been injured in her means of support by reason of the intoxication of her husband, produced by liquor sold to him by appellant, J. C. Maloney, in a building in Bloomington belonging to Kate V. Maloney, who knowingly permitted intoxicating liquor to be sold therein. The evidence shows that the plaintiff was substantially injured in her means of support by the cause alleged and the sum awarded by the verdict is very moderate.

The first objection noted in the brief is that evidence was allowed to go to the jury as to intoxication of her husband while at Champaign, and the expense sustained by the plaintiff in going after him and bringing him back to Bloomington. It appeared that he became intoxicated at Bloomington, and while in that condition went to Champaign and

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so continued for several days, and that plaintiff was thereby put to the expense and trouble mentioned. How far the appellants were responsible for this debauch was a fair question for the jury. The husband testified that at the beginning he got one glass of beer at Maloney's and that he kept on drinking until he did not know what he was doing, and went to Champaign while so intoxicated, where the debauch was continued till the plaintiff came after him.

She testified that she saw him come out of Maloney's and soon after he went home, then being under the influence of liquor; that he cursed her and got his clothes and left, and she did not know where he was until she heard he was in Champaign. The jury were warranted in the inference that the liquor furnished by Maloney contributed, in part, to this intoxication, which was protracted for some four days. It is objected that the court permitted the husband to testify that he was frequently in Maloney's saloon on Sunday; that it was not material so far as this action was concerned whether he was there on Sunday or on week days, and that such proof was calculated to influence the jury. If it was true that the sales were made on Sunday, there is no reason why it should not be proved, not because, in a legal sense, it was important to show that Sunday was thus violated, but merely because it was one of the facts of the case. It would have been perfectly proper to prove the day of the week, if known, that any of these transactions occurred, and plaintiff was not to be debarred from thus identifying the act complained of, because by so doing the defendant would appear to be guilty of an infraction of the statute upon which she did not rely for a recovery.

As already observed, the verdict is a very moderate one, and there can be no reason for supposing that the jury were at all influenced by this proof, but whether so or not, there was no error in this respect.

It is urged that the court refused to permit the husband, Dailey, to testify on cross-examination that the intoxication relied on in this case was the same upon which plaintiff had recovered in a suit against Blumke, the record of

which case is also before us at this term. The court ruled merely that the witness could be asked what he testified in the Blumke case. This was right. It was for the jury to hear the evidence and determine whether the intoxication proved in this case was the same upon which recovery was had in the Blumke case, and the witness was required to state what he did testify in that case. It was not for him to swear to his conclusion or opinion upon the point.

Another objection is that the witness Jones was not permitted to state on cross-examination what plaintiff said to him on a certain occasion.

The question asked and excluded did not pertain to the subject-matter of the direct examination, and the defendant was therefore properly required to make the witness his own and examine him on the point, which he did, and thereby elicited all the witness knew of the matter.

It is urged the court erred in admitting evidence that Dailey failed to pay his rent and that he also owed the landlord for money advanced him to go to a place named for the purpose of being cured of the liquor habit.

We see no error in this, as it tended to show that his estate was wasted and he involved in debt because of his appetite for drink, and this directly tended to prove the plaintiff's allegation that she was injured in her means of support. Nor was it error to refuse proof that the plaintiff might have employed some one to take the produce of the garden to market. Of course she might, but if it was the work her husband should have done, and did, when sober, and which he neglected when drinking, it is not apparent that the defendant could escape responsibility by showing that some one else might have been employed to do what he thus neglected. It is argued that by the weight of the proof the plaintiff authorized Maloney to sell liquor to her husband. As to this the evidence is conflicting. The witnesses called to prove such permission fixed the time when they heard her give it, in May, 1894. She positively denies it and proved by her own testimony and that of another witness that she expressly forbade Maloney to let her husband have

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any more liquor as late as September, 1894, and it was shown that the notice was disregarded, for he drank there repeatedly after that date and was frequently drunk. One of the witnesses who was called to prove her permission took her husband home drunk, from Maloney's place, in November, and said that she then told him she had forbidden Maloney to let her husband have liquor, but had afterward recalled it and authorized him to let him have liquor but not enough to make him drunk. Manifestly this was not the fact, and if she ever gave the permission it was before the prohibition, and probably the witness misunderstood her if indeed she said anything to him about it. Other witnesses said they heard her say to Maloney in her husband's presence and at his instance (she and he then being in a wagon on the street, and Maloney standing on the sidewalk in front of his place), that she did not care if her husband got liquor there if he did not get too much.

The jury may have believed that she did give this conditional permission in May and that in September following she made the prohibition absolute.

It was for the jury to reconcile the evidence and to say which witnesses were the more credible. Even if the jury believed there was the conditional permission testified to by some of the witnesses it would not bar the action for actual damages caused by his intoxication. *Hackett v. Smelsley*, 77 Ill. 124.

As to instructions some complaint is made. First, that the plaintiff's instruction No. 1 in effect advised the jury that the owner of the building would be liable jointly with the person selling the liquor if such owner "knew that intoxicating liquors were sold in the building."

The statute provides, Sec. 9, Chap. 43, that if the owner of a building shall permit the occupation thereof with knowledge that intoxicating liquor is to be sold therein, or, having leased for other purposes, shall knowingly permit therein the sale of intoxicating liquor, he shall be liable with the person who dispenses the liquor.

The instruction referred to is not so precise and accurate

as it should be, but there was no dispute as to that branch of the case.

There was no denial that the building was fitted up and rented for the express purpose of conducting a dram shop therein, and it would be absurd to reverse this judgment because of the inaccuracy of the instruction in that respect.

Objection is taken to several instructions upon substantially one ground, that is, that the jury were advised to find for plaintiff, in case it appeared her husband became intoxicated on liquor furnished by defendant, and while in that condition wasted and squandered his property to the injury of her means of support, the criticism being that the instructions did not make it an essential element of the case that the squandering of property was in consequence of the intoxication, because it is said, a sober man may squander his means, and therefore it is not enough that the wasting and squandering occurred during the intoxication. Technically, the criticism is correct, but it is too refined for application here. It may be well inferred that a man who attends to his business when sober and neglects it when drunk is so negligent because of the drunkenness. In the present case, there is no question that the wasting and squandering of money and other property by Dailey during intoxication was directly in consequence thereof. That was not in dispute, and, as has been remarked in reference to other instructions touching a point not controverted, the judgment is not vitiated by a mere technical inaccuracy in an instruction upon such a point.

Objection is made to the third instruction for plaintiff, because it advises the jury that a wife may be injured in her means of support when her husband's ability to furnish her with the comforts of life is lessened or destroyed, although she may not be deprived of the bare necessities of life. As applied to this case, the instruction was substantially correct. *McMahon v. Sankey*, 133 Ill. 643.

It is argued that the fourth instruction improperly assumes facts which were in dispute. We think not.

Several other instructions are also objected to, but the

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objections are much of the character of these noticed and are quite unsubstantial. We deem it not necessary to discuss the points presented thereby. We consider the verdict responsive to the merits of the case as disclosed by the evidence, and we find no error of law which ought to work a reversal. The judgment will be affirmed

Lawson R. Barker v. John Keown.

1. **CONTRACTS**—*Parties Have a Right to Know with Whom They Are Contracting.*—Every person has a right to select and determine with whom he will contract, and can not have another person thrust upon him without his consent, and if goods be sold as the property of some person other than the owner, the purchaser may refuse to take them on discovering the fact.

Transcript, from justice of the peace. Appeal from the Circuit Court of Brown County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

R. E. VANDEVENTER and VANDEVENTER & MONTGOMERY,
attorneys for appellant.

REGAN & BAKER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$53 recovered by Keown against Barker for the price of a horse.

The facts material to be considered are that Edward Irving, as administrator, advertised to sell at public auction the personal property of Thomas Vandeventer, deceased, consisting mainly of agricultural implements, grain, live stock, etc. Among other chattels so advertised were a number of horses. The sale lasted two days. The appellee privately induced the auctioneer to place the horse in question among those of the estate, and offer it for sale without any intima-

tion or suggestion that it did not belong to the estate, and the appellant, not knowing or having any reason to know or suppose that it was not the property of the estate, bid on and purchased it at the price of \$53.

The animal was found to be of a vicious disposition, and the appellant learning that it had belonged to the appellee, and not to the estate, refused to take it from the premises, and never did take or use it in any way.

It was taken away by some one else, and was finally sold for a feed bill.

The question is whether the fraud practiced upon the appellant in putting up the horse as the property of the estate when it was not, gave him sufficient reason for rescinding the purchase, and refusing to pay the amount of his bid. We think the answer should be in the affirmative. It is a rule of general application that every one has a right to select and determine with whom he will contract, and may not have another person thrust upon him without his consent.

A man may be willing to deal with a certain person for some reason satisfactory to himself, and yet not with another on precisely the same terms.

He has that right, and having made a proposition or an offer to A, may refuse to make it to B. Hence, if A should accept, and B should carry it out by furnishing the goods or the like without his knowledge that B and not A was doing it, he could not be held.

Such in substance was the case of *The Boston Ice Company v. Potter*, 123 Mass. 28.

There the defendant contracted with the Citizens Ice Company for his supply of ice. The latter company sold its business to the plaintiff, and it furnished ice to the defendant for a year. The ice was left at defendant's dwelling as ordered by his servants, but he did not know that it was not being furnished by the Citizens company.

He was held not liable, and it was said, in substance, that it was his right to contract with whom he pleased; that his reasons for so doing were not to be inquired into, and that he could not be made liable to another without his consent.

McRoberts v. City of Sullivan.

No privity of contract was established between plaintiff and defendant, and without such privity the possession and use of the property would not support an implied assumpsit.

No presumption or assent could be implied from the reception and use of the ice, because defendant did not know it was furnished by plaintiff and supposed it came from the Citizens company under his contract. Many cases were cited, among which was Winchester v. Howard, 97 Mass. 303, very much like the present.

A case still more like it, indeed identical with it in all essential features, is Thomas v. Kerr, 3 Bush (Ky.), 619, where it was held that the bidder under such circumstances is not bound upon the same reasoning above outlined. The general principle involved is announced in Arkansas Smelting Co. v. Belden Co., 127 U. S. 379. We are of opinion the appellant was not liable. The judgment will be reversed and the cause remanded.

67	435
81	344

W. H. McRoberts v. The City of Sullivan.

1. CITIES AND VILLAGES—*Prosecution for Selling Goods Without License from—What Must be Shown.*—In a prosecution under a city ordinance for selling goods without a license it should be shown that the amount to be paid for the license was fixed by the city council, and it is essential that the rate so fixed be reasonable.

2. SAME—*Limitations on Power of Council to Regulate Transient Trading.*—The statute which confers power upon city councils to regulate itinerant or transient trading, does not authorize discrimination in favor of any business or against any that is lawful in itself and its methods, and an ordinance which attempts to do either is void.

Complaint, before justice, charging violation of city ordinance. Error to County Court of Moultrie County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in this court at the May term, 1896. Reversed. Opinion filed November 21, 1896.

R. M. PEADRO, attorney for plaintiff in error.

RAY D. MEEKER, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was convicted, and fined \$25 for violating section 11, ordinance No. 7, revised ordinances of the city of Sullivan, which reads as follows:

“No transient trader shall, either in person or by employing a resident auctioneer, sell or barter by retail any goods, wares, merchandise or patent medicine, not being agricultural products, without a license therefor. Any person violating this section of this ordinance shall, on conviction thereof, be fined not less than \$25 nor more than \$200 in each case. The term “transient trader” shall be construed to mean any person not permanently transacting business in this city.”

This section is predicated upon Sec. 62 a, Chap. 24, R. S., which authorizes the city council to “license, tax, regulate, suppress or prohibit itinerant merchants and transient venders of merchandise.” In the case of *City of Carrollton v. Bazzette*, 159 Ill. 284, the Supreme Court had occasion to consider this provision of the statute, and held that it was not the intention of the legislature to authorize the arbitrary suppression of a business unless, in the character of the goods sold or the manner of conducting the business, there was something detrimental to the public welfare; and as applied to the case in hand, which involved merely the sale of ordinary dry goods at auction and in the usual course of trade at retail, the ordinance must be regarded as intended to license and regulate, and not to suppress or prohibit. The statute would not support a prohibitory ordinance as to a business not so objectionable in respect to the character of the article sold or the mode of selling, and so it was material to inquire whether the license fee fixed was reasonable or whether it was so high as to amount in effect to a suppression of the business rather than merely a regulation of it by license. It was held that the fee of \$10 per day, making no discrimination as to the extent of the business or the length of time it was to be conducted, was unreasonable, and that therefore the ordinance was void. In the present case no rate for the license fee is provided and it must be inferred

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that the amount to be charged was left to the unrestrained discretion of some city official vested with authority of issuing such licenses.

Perhaps there is a provision in some other section fixing such fees, but if so, it is not shown by the record. We must therefore treat the ordinance for the present purpose as it appears.

It was held in *City of East St. Louis v. Wehrung*, 50 Ill. 28, that an ordinance which conferred power upon the treasurer to fix the amount of license to be paid by dram-shop keepers was void. The court there said: "As a general rule when power is conferred upon a municipal corporation to regulate any calling or business it is powerless to delegate a discretionary authority to others or to an individual." * * * "And the amount to be paid should be determined by ordinance or order of the council and not left within the discretion of a single officer of the city."

So in this case it should have been shown that either in the same or some other ordinance the amount to be paid for the license was fixed by the council. It would, of course, be essential that the rate so fixed was reasonable.

Another objection to this ordinance is that it discriminates in favor of persons selling the products of agriculture.

Merchants dealing in hay, grain, vegetables and seeds, should have the same protection as those handling other merchandise. The statute which confers power to regulate itinerant or transient trading is general in its terms, and does not expressly or by any implication indicate authority to discriminate in favor of any branch of business or against any that is lawful in itself and in its methods. The ordinance is therefore partial and unequal in its operation, and for that reason is void. *The City of Peoria v. Gugenheim*, 61 Ill. App. 374, and authorities there cited.

The judgment must be reversed.

John Ruble v. The People of the State of Illinois.

1. **ASSAULT WITH DEADLY WEAPON**—*Considerable Provocation a Question of Fact.*—Whether an assault with a deadly weapon made with an intent to inflict upon the person of another a bodily injury, was without considerable provocation, is a question of fact for the jury under all the evidence. The law does not define provocation or the degree thereof which shall be deemed considerable; whatever would conduce to arouse anger is proper to be proved, and it is an invasion of the province of the jury to declare to them that words can not be considered.

Indictment, for assault with deadly weapon. Error to the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 25, 1896.

WM. A. CRAWLEY and RICHARD YATES, attorneys for plaintiff in error.

FELIX D. McAVOY, attorney for defendant in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was placed upon trial on an indictment which charged he had made an assault upon one George Wackerle with intent to kill and murder said Wackerle.

The jury found the plaintiff in error guilty of making an assault upon the prosecuting witness and with a deadly weapon, but found the intent was not to take the life of the prosecuting witness, but only to do him a bodily injury, and that there was no considerable provocation for the assault.

The offense of which the plaintiff in error was thus convicted is statutory.

The design of the statute is to punish aggravated cases of assaults, wherein, without any considerable provocation, a deadly weapon is used, not with intent to take human life, but only to inflict bodily injury.

Ruble v. The People.

The assault in the case at bar was with a deadly weapon, but, as the jury determined the plaintiff in error had no design to take the life of the prosecuting witness, it became of first importance to ascertain whether he used the deadly weapon "without any considerable provocation."

That was a question of fact, not of law.

The law does not define provocation, or the degree thereof which should be deemed considerable.

It was a question for the jury under the evidence.

The court, however, instructed the jury in effect that "even very abusive and insulting language, or words calculated to arouse anger" did not constitute a justifiable excuse or justification for the defendant.

Herein, as we conceive, the court erred.

The effect of the instruction was to lead the jury to understand that words could not be considered by them in arriving at a conclusion whether the plaintiff in error fired the pistol under the influence of a considerable provocation.

Mere words do not justify or excuse an assault or assault and battery, but it is sought to convict the defendant of neither of these offenses, but of a statutory offense of which he could not, by the very terms of the statute, be guilty, unless he committed the assault without any considerable provocation.

The word provocation has no meaning in law different from that of popular acceptation. It is defined by Webster as the "state of being provoked; vexation; anger."

Whatever would conduce to arouse anger was proper to be proved, and it is an invasion of the province of the jury to declare to them as a rule of law that words, however exasperating, can not be considered in determining whether a defendant had acted under the influence of rage and passion so provoked.

Words do excite the passions and arouse anger and rage, and while they are not sufficient in law to justify an assault or an assault and battery, yet they are proper for consideration in connection with the conduct of the prosecutor when, as here, it is to be determined whether the defendant is

guilty under the statute of acting without considerable provocation.

The evidence disclosed the prosecuting witness, while greatly intoxicated, sought the plaintiff in error for the purpose of forcing a personal encounter, and in the presence of a number of persons applied to him profane and highly insulting epithets, made vicious threats, invited him to fight, assumed a hostile attitude and brought on the affray in which the shot was fired.

The cause of the plaintiff in error was prejudiced by the instruction mentioned, and under the evidence found in this record we think the error such as to demand his case should be submitted to another jury for trial.

The judgment must be and is reversed and the cause remanded.

S. P. Drake, Noah Hostetler and L. G. Hostetler v. Moses Sherman, Patrick McDermott and W. C. Foley.

1. **CONTRACTS—*A Contract Construed.***—A contract in the following language: “* * * we, the undersigned, agree to pay —, bankers at —, any loss they may sustain through and by virtue of overdrafts on said —’s books of accounts, or money advanced or paid out by them on the checks of demand, or drafts of —, for the purpose of buying stock, grain, or any other purpose whatsoever; that said — may advance or pay out money on the aforesaid —’s checks of demand or drafts,” does not cover past transactions, and only renders the signers liable for debts incurred subsequent to its execution; but exchange and interest, being proper charges in the banking business, as usually conducted, are collectible under said contract.

Bill, for relief against a judgment by confession. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 25, 1896.

J. R. & WALTER EDEN, attorneys for appellants.

W. C. OUTTEN, attorney for appellees.

Drake v. Sherman.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellees filed their bill in chancery against appellants for the purpose of obtaining relief against certain judgments by confession, which had been entered against the appellees in favor of the appellants.

It appears that on the 11th of March, 1893, the appellees executed and delivered to appellants an instrument in writing, as follows:

“For and in consideration of one dollar (\$1) in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, hereby agree to pay Drake, Hostetler & Son, proprietors of Hardware Bank, at Lovington, Illinois, any loss they may sustain through and by virtue of overdrafts on said Drake, Hostetler & Son’s books of accounts, or money advanced, or paid out by them on the checks of demand, or drafts of John McDermott, of Lake City, Illinois, for the purpose of buying stock, grain, or any other purpose whatsoever; that said Drake, Hostetler & Son may advance and pay out money on the aforesaid John McDermott’s checks of demand or drafts.

Signed by us this 11th day of March, 1893.

Signatures witnessed by

JOHN McDERMOTT,

J. McDERMOTT,

MOSES SHERMAN,

Witness

his
PATRICK X McDERMOTT.”
mark.

John McDermott, who had been doing business with appellants for a considerable time before, continued the same until about the 29th of October, 1893, when he failed, and some three or four days later the appellant Drake notified the appellees that the balance due the appellant from said McDermott for which the appellees were liable was \$5,272.95, and asked for settlement.

Appellees were unable to make payment of said amount, and relying upon the representations of Drake, gave three judgment notes upon which the judgments in question were based. The decree entered in the case found that the amount

so claimed included a sum due the appellants at the time the said contract was signed; that it also included a considerable sum for interest and exchange on the business done with said McDermott and that the notes were so drawn as to include interest at the rate of twelve per cent per annum until their maturity respectively. It further found that appellees had made a payment of \$2,408.78 before learning the facts above stated, and relieving them in respect to the three items mentioned, found there was equitably due from them upon said judgments the sum of \$1,327.25, which they were required to pay with interest from April 16, 1895.

Appellants complained of the construction put upon the contract, and this presents the first question for consideration.

We are inclined to agree with the view taken by the Circuit Court, that the contract was intended to cover liabilities subsequently incurred only. Very clearly we think the appellees had no purpose of binding themselves for any sum then due on account of overdrafts.

They did not know there was any such indebtedness.

The language of the instrument when all taken together and fairly construed relates to the future, and does not include past transactions.

We are not, however, satisfied with the holding in reference to the item for interest and exchange.

As we understand, the charges made by the bank, for interest upon amounts overdrawn and for exchange on drafts upon other parties, were stricken out.

So far as the charge for interest was in excess of the lawful rate, such holding was correct. But as the complainants were asking equitable relief, they should have been required to do equity, and as to interest on overdrafts this would have been accomplished by deducting the usurious excess and charging the legal rate. *Clark v. Fenlon*, 90 Ill. 245. It is not perceived why the item for exchange should have been rejected. Exchange as well as interest is a proper charge in banking business as usually conducted. These are indeed the ordinary and usual sources of banking profits. It could

Chicago-Virden Coal Co. v. Wilson.

hardly be supposed that a bank would wish to do a business of the character here shown without making such charges, or that it is was so expected by these parties. Hence, in ascertaining how much was due on McDermott's overdrafts it was proper to charge him with legal interest and customary exchange whenever in the course of the business such charges were appropriate as against him. In striking out such charges the decree is erroneous. In so far as the notes given on the settlement contained interest in excess of the legal rate they were properly reduced, and complainants were properly required to pay the legal rate only.

It remains to consider the cross-error assigned by appellees. This relates to the finding that Sherman, one of the appellees, called at the bank and made inquiry as to the condition of said McDermott's account, and that the response to such inquiry was not untrue.

It is argued that the proof shows that the balance due at the time of such inquiry was understated in a substantial amount, and that, had the truth been then made known, appellees would have taken steps to secure themselves and could have done so, but they were misled by the false statement.

The evidence is so conflicting on this point that the court rightly concluded the preponderance was not with the appellees, and as the onus was upon them, the finding was necessarily against them.

The cross-error must be overruled.

For the error indicated, the decree will be reversed and the cause remanded.

The Chicago-Virden Coal Company et al. v. Martin C. Wilson.

1. **MEASURE OF DAMAGES**—*For Injury Caused by Smoke, Gas and Dust.*—In a suit for damages caused by smoke, gas and dust escaping from an embankment of slack built for a railroad switch in front of the residence of plaintiff, the damages are not to be measured by the rental

value of the residence, for the great injury is in the physical discomfort and the deprivation of the comforts of a home. No fixed rule can be stated, and the amount allowed must be left to the sound discretion of the jury in view of the facts of the particular case.

2. NUISANCES—*Who Liable for.*—Where an embankment is built on the right of way of a railroad company, and a switch is laid over the embankment for the purpose of connecting the main line of the railroad with a coal mine, the work being done by the owners of the coal mine, with the consent of the railroad company, and for the joint use of both, both may be held responsible for any damage caused thereby.

Trespass on the Case, for damage caused by smoke, gas and dust. Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

COWEN & COWEN and RINAKE & RINAKE, attorneys for appellants.

S. PITMAN and FRANK W. BURTON, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$140. The action was case for damages caused plaintiff by reason of building an embankment for a railroad switch in front of his residence.

The embankment, ten or twelve feet high, was built of slack, or fine coal, which when piled in such quantities is apt to ignite spontaneously and to burn continually, giving off smoke and gas very freely. It is always difficult to extinguish such a fire, and in spite of all efforts it continued in this instance for several months.

According to the testimony it was a very grave annoyance to the plaintiff and seriously interrupted him in the enjoyment of his property.

Smoke and gas and dust were carried into his house to such an extent as to injure furniture and apparel therein, and produce great physical discomfort to him and his family. That he sustained actual and substantial damage is not doubted, and we are not prepared to say the sum allowed is too great in view of the testimony.

Haines v. Hay.

In such a case the damages are not to be measured by the rental value of the house, for the great injury is in the physical discomfort and the deprivation of the comfort of the home.

No fixed rule or measure can be stated, and the amount allowed must be left to the sound judgment and discretion of the jury in view of the facts of the particular case. *Gempp v. Bassham*, 60 Ill. App. 85. The embankment was built on the right of way of the railroad company, and a switch track was laid over the embankment for the purpose of connecting the main line of the railroad with the coal mine. It seems that the work was done by the coal company, but with the consent of the railroad company, and for the joint use and convenience of both. Both may therefore be held responsible. *Am. & E. Ency.*, Vol. 16, 980.

Complaint in a general way is made of the action of the court in refusing certain instructions, but no special reasons are assigned, and it is urged that there was error in giving two instructions asked by appellee in reference to the measure of damages. After reading all the instructions given and refused, we think the appellants have no just ground of objection in that behalf.

The appellee had a cause of action, and the amount awarded is not unreasonable according to the proof. The judgment is affirmed.

67	445
169s	93

Samuel Haines, Trustee, et al., v. Charles E. Hay et al.

1. **ADMINISTRATORS—***When Not Chargeable with Interest.*—An administrator has no authority to invest money in his hands, but is bound to have it forthcoming whenever the court shall so order, and if he has not used the money, or realized anything from it, he can not be required to pay interest thereon.

2. **SAME—***Commission on Trust Funds.*—Where a decree has been entered holding that certain funds in the hands of an administrator are trust funds, and not assets of the estate, that such administrator has no right to administer on such funds and requiring him to pay them over

to a trustee who has been appointed to receive them, it is proper to refuse to allow such administrator commissions on such funds to be deducted therefrom.

Petition, for order requiring payment of interest on decree. Error to the Circuit Court of Sangamon County; the Hon. R. B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

W. L. GROSS and A. G. MURRAY, attorneys for plaintiffs in error.

CONKLING & GROUT, attorneys for defendant in error.

• MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

A decree of the Circuit Court, rendered June 26, 1891, declared that of the funds held by John S. Bradford, administrator, etc., the sum of \$10,000 was a trust fund held and managed by the intestate for the use of the beneficiaries named in the will of Sarah M. Bennett, and therefore it was ordered that the administrator pay said money over to Samuel Haines, who, as trustee appointed by the court, was to hold and manage the same according to the provisions of said will.

From that decree the administrator prosecuted an appeal to this court, pending which he died.

Charles E. Hay, defendant in error, became his successor, and he appealed from the judgment of affirmance in this court to the Supreme Court, where the decree was finally affirmed, October 30, 1894. Hay v. Bennett, 153 Ill. 271. Shortly after the latter date, said sum was paid by the administrator to the trustee, who demanded interest also, at the rate of six per cent per annum, from the date of the decree, which, being refused, the trustee had the cause redocketed, and asked a rule upon the administrator to pay such interest, making as additional defendants to said application, the Ridgely National Bank, and William Ridgely and Charles Ridgely, who were respectively president and vice-president of said bank. It appears that Bradford kept the cash in his hands, as administrator, on deposit in said

bank, and was allowed the customary interest on daily balances, which amounted at the time of his death to \$756.56 and was credited to his account as administrator, and that the total then standing to his credit was \$10,110.73. This sum was transferred to Hay when he took charge of the estate, and was deposited in the bank to his credit as such administrator, and so remained until the final decision, the interest allowed as before on such balances, amounting to \$641.21, being credited to his private account.

On the hearing and consideration of the matter, the court required Hay to account only for the interest so actually received by him, with interest thereon from December 1, 1894, at five per cent. The record is now brought here by the trustee on writ of error, and he urges that the court erred in not charging the administrator with statutory interest on the \$10,000 from the date of the first mentioned decree, June 26, 1891.

If such interest is allowed, it must come out of the pocket of the administrator, for there is nothing in the estate wherewith to pay it, the cost of litigation having absorbed the amount in his hands over and above said sum of \$10,000 excepting eighty-eight cents, which also was charged to him by the court in the decree now under consideration.

It appears that he did not use the money, and realized nothing from it, except the interest so allowed by the bank. Why he should pay the interest demanded is not apparent.

The decree was not personal as to him, that is, it was not against him in his personal capacity. It amounted merely to a finding that the money mentioned, in the hands of the administrator, was not assets of the estate, and was not to be so treated, but should be handed over to a trustee. In effect, it withdrew the money from the estate. Had the estate remaining in the hands of the administrator been sufficient to allow a payment of the interest, another question would be presented; but it is difficult to assign a good reason why the administrator should pay more than he has realized.

He had no authority to invest the money. He was bound

to have it forthcoming whenever the courts should finally determine the question in dispute. He could not know when that might be, and he did the only safe and prudent thing open to him, which was to deposit it in bank and receive such interest as he could obtain thereon. Nor is it perceived why the bank should be called on. It took the deposit in the usual course and allowed the usual rate, and has fully performed its obligation by paying the depositor the amount with interest.

The mere fact that its president and vice-president knew all the circumstances, should not require the bank to assume any additional liability in the premises.

Wm. Ridgely was surety on the appeal bonds and Charles was surety on the bond of Hay, as administrator. Their liability is merely that of suretyship, and whenever the principal discharges his liability their immunity is complete. We see no ground on which they can be held except to make good his obligation should he fail therein.

It is assigned as a cross-error that the court did not allow Hay commission as administrator upon and for handling the \$10,000.

That sum was no part of the estate to be administered. The estate had nothing with which to pay such commission, and it would be unreasonable that the fund, which had been adjudged a trust fund, not to be regarded as assets of the estate, should be diminished by commissions to an administrator who had no right to act as administrator in that behalf, and who was required to set the money aside for that reason and pay it over to the proper custodian, the trustee.

The decree will be affirmed.

William N. Hairgrove v. Theodore Curtiss et al.

1. JUROR—*Misconduct of—What is Not.*—A conversation between a juror and an agent of one of the parties to a suit, had during an intermission of the court while the case was on trial, is not ground for a reversal of the judgment rendered, if it be shown that the conversation

Hairgrove v. Curtiss.

was casual, had no reference to the case, and was very brief and in no-wise private or clandestine, but open and in the presence of others.

2. VERDICTS—*When Conclusive.* — Where the whole controversy turned on the facts, as to which the evidence was conflicting, and there was no erroneous ruling which probably did or could affect the jury in arriving at their verdict, it will not be disturbed.

Assumpsit, for legal services. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

GEORGE W. SMITH, E. C. KNOTT and J. J. REEVE, attorneys for appellant.

JOHN A. BELLATTI, attorney for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was assumpsit to recover for professional services alleged to have been rendered by the plaintiff as an attorney at law for the defendants. A trial by jury resulted in a verdict for defendants, and judgment was rendered accordingly after a motion for a new trial was overruled.

The plaintiff claimed that he had an arrangement with defendants by which he undertook to collect an account held by them against one McCasland, and that for his services he was to have one-half of whatever he could collect; that he took such action as induced the debtor to offer as a compromise certain real estate in the city of East St. Louis, which the defendants did not accept, and that they then, acting upon the information derived through the plaintiff, employed another attorney, who brought suit against the debtor and succeeded in collecting some \$2,200, and plaintiff insisted that he ought to receive just compensation for his services, which, as he claims, led the defendants to such a knowledge of the debtor's location and financial condition as enabled them to secure the sum mentioned on a demand which they had previously considered worthless. The testimony of the plaintiff was to the effect stated, and as is urged, was somewhat corroborated by other evidence offered

on his behalf. That of Hutchinson, the cashier and agent for defendants, with whom plaintiff claims to have made the arrangement relied upon, is flatly to the contrary, and is in some degree supported by other evidence offered on their behalf. While the brief of appellant urges with persistence and apparent confidence that the judgment should be reversed on the evidence, we are compelled to say that after a careful examination of the abstract, as well as the arguments, we find no sufficient ground for the contention. Perhaps a verdict for the plaintiff would have been warranted by the proof—possibly such a verdict would consist with the greater weight of the evidence as it appears in the written record; yet there is no such preponderance as would require or justify a reversal for that cause.

The burden of proof was on the plaintiff, the evidence was in hopeless conflict upon a vital point, and it was a question as to the credibility of the witnesses which must be regarded as settled by the verdict.

It is urged the first instruction given at the instance of defendants as to the burden of proof was misleading as applied to the evidence and should not have been given. We think not.

The third is objected to because it holds the plaintiff to proof of compliance with the undertaking to collect before he could recover anything. Such is not its purport, but that the plaintiff could not recover the alleged agreed compensation, to wit, one-half of the amount collected, without showing that he did collect in accordance with the agreement, which is certainly correct. The objection to the fifth is also based upon a misapprehension of its meaning. It is to the effect that the burden was on plaintiff to show that Hutchinson was authorized by defendants to employ the plaintiff and that he did so, and if plaintiff had failed to prove either of said propositions, or that defendants ratified the employment by Hutchinson, the jury should find for defendants. By the instruction it was intended to say (and we think it was so understood) that plaintiff must show employment by Hutchinson and that Hutchinson was

authorized for that purpose, or that his act in that respect was ratified and was in line with instructions three, four and five, given at the instance of the plaintiff. As to the refusal to give instructions one and two asked by plaintiff of which complaint is made, it will be found that their substance, so far as important and essential in view of the issue as presented to the jury, is sufficiently contained in the third given. The points made by those instructions are not contradicted by any given for the defendants, but are in effect implied, if not directly conceded.

We can not suppose that the jury would have been led to a different view of the case in any respect had the refused instructions been given.

It was urged as one of the grounds for a new trial, that there was improper conduct on the part of one of the jurors in holding a conversation with the witness, Hutchinson, during an intermission of the court while the case was on trial, but it was satisfactorily shown that the conversation was casual, had no reference whatever to the case, and was very brief and not in anywise private or clandestine, but open and in the presence of others, in a public place.

There is nothing in that point, nor in the position also urged that the sheriff favored the defendants by coercing the jury.

The plaintiff made affidavit in support of the motion for new trial, to the effect that he could prove by the officials, R. G. Dun & Co., that no report of the standing of McCasland was given to Hutchinson, as testified to by the latter. In looking through Hutchinson's testimony, as given in the abstract, we do not find any statement by him as to a report furnished by Dun & Co. in reference to McCasland, nor can we see how the supposed testimony would be decisive, nor is there an affidavit of the witness by whom such proof could be made.

This point must also be overruled.

As another special ground for new trial, the plaintiff made affidavit that the testimony of Theodore E. Curtiss, one of the defendants, took him by surprise, because it was

different from what the same witness had testified on a former trial of the case. A copy of the reporter's notes of the testimony as formerly given was also presented, from which it appears that when he first testified the witness had no recollection of ever talking with the plaintiff about the matter, while on the last trial he did remember that there was a conversation between them, but did not agree with plaintiff as to what occurred.

The witness was eighty-two years old at the last trial, and admitted on cross-examination that his memory was indistinct as to the particulars of the conversation. No sufficient reason is shown for not producing the notes of the former testimony on this trial, nor is it probable that if they had been produced the result would have been any different. The last testimony, when all considered, is not more prejudicial to the case of the plaintiff, in any substantial or tangible respect, than the first. We are very clearly of opinion the ground thus alleged did not require a new trial, of itself, or in connection with the other points presented by the motion. The whole controversy turned on the facts as to which the evidence was conflicting, and we find no erroneous ruling which probably did or could affect the jury in arriving at their verdict. The judgment must therefore be affirmed.

John McDavitt v. Thomas J. Boyer.

1. **PRACTICE**—*Objection on Ground of Variance Should be Raised in Trial Court.*—In a slander suit, where there was abundant proof of the substance of the allegations of the plaintiff's declaration, and where no specific variance was pointed out on the trial, an Appellate Court will not consider an objection, that the slanderous words alleged and those proved, do not correspond, if made before it for the first time.

2. **SLANDER**—*Prosecutor Exempt from Liability During Trial Only.*—While a person who is managing a prosecution before a justice of the peace on behalf of the people, on a complaint which he has himself preferred, is exempt from liability for whatever he may reasonably have

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occasion to say in the course of such prosecution, yet this protection does not extend to what is said after the trial is over, when there is no longer any occasion or excuse for the use of slanderous language.

Trespass on the Case, for slander. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

HENRY S. TANNER and JOSEPH E. DYAS, attorneys for appellant.

S. I. HEADLEY and F. W. DUNDAS, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Boyer brought an action on the case for slander against McDavitt, and upon a trial by jury, recovered a verdict for \$1,000. The court refused a new trial and rendered judgment accordingly, from which the present appeal is prosecuted. The alleged slander consisted of a charge that the plaintiff had committed perjury and had suborned one Glover to commit perjury.

It was clearly proved that defendant did repeatedly utter slanderous charges substantially as alleged, imputing to plaintiff the crime of perjury and subornation of perjury. It is suggested in the brief that the evidence does not correspond with the allegations, meaning, as we suppose, that there is a variance between the words charged and those proved.

Such variance should have been pointed out at the time, so that the objection might have been obviated by amendment. This was done in one instance. There is abundant proof of the substance of the allegations, and where no specific variance was pointed out on the trial, we are not inclined to consider such an objection made here for the first time. The chief defense is that the speaking of the words in question was privileged because done in the course of a prosecution on a charge of perjury and subornation thereof before a justice of the peace. It appears that the parties had several suits growing out of trespasses by stock, that much ill-feeling resulted, and that the defendant made

said charge of perjury and caused the plaintiff to be arrested and brought before a justice of the peace for a preliminary examination.

During this proceeding the defendant made most of the slanderous charges in proof, and it is urged that what he so did on that occasion was within his privilege as prosecutor for the people. It has been held that an action will not lie for words spoken by a person who is managing a prosecution before a justice of the peace in behalf of the commonwealth, on a complaint which he has himself preferred. *Hilliard on Torts*, Vol. 1, p. 321, 3d Ed., citing *Hoar v. Wood*, 3 Met. 193. Assuming that such is the law as applicable here, it would exempt the defendant from liability for whatever he may have reasonably had occasion to say in commenting upon the evidence introduced. In other words, whatever may have been within the scope of the privilege of counsel in such case he might say, if he was conducting the case for the State, although he had preferred the charge.

Treating him with the utmost liberality, he would not be protected in what he said after the trial was over and the plaintiff had been acquitted, and it was shown that he was then very free in repeating the charges in question, when there was no longer any occasion or excuse therefor. It was also shown that before he made this complaint, he made a similar charge in a conversation he had with one Waltz. Other testimony was to the same effect, and there is little room to doubt that he was greatly incensed because of the controversies with the plaintiff and that he repeatedly and maliciously charged him with perjury and subornation thereof. He attempted to justify by showing that the plaintiff had testified falsely in one of the former trials. How far he succeeded in this was for the jury.

The brief of appellant is mainly, almost wholly, devoted to a discussion of the merits of the case as shown by the proof. No erroneous ruling of the court in admitting evidence is urged, except in a general way, that the court erred in admitting proof of what was said by defendant when he applied for the warrant before the justice of the peace. The same witness testified that at another time and place the

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defendant repeated the slander. What he may have said when about to make a charge, so as to enable the justice to prepare a complaint in legal form, would perhaps be regarded as privileged, or in effect but a part of the formal complaint.

It is not clear from the abstract, nor, indeed, from the record, whether what he said when the warrant was obtained, was for the purpose of so informing the justice as to the matter to be embodied in the complaint, or whether it was a gratuitous and unnecessary repetition of the charge for a merely malicious purpose.

Whether what he then said was within the protection of the privilege, it is clear that his subsequent statements to the same effect were not.

We can not say that any substantial error was committed in this respect. Had it been desired to eliminate whatever was said on that occasion, or on the occasion of the trial, that may have been privileged, an instruction might have been asked stating the rule of law on the subject, but we find none such, nor any complaint as to the action of the court in giving or refusing instructions on either side.

Briefly, then, it is shown that defendant repeatedly made slanderous charges, actionable *per se*, against the plaintiff, not in course of judicial proceedings, and not within any protection of privilege on that account; that the proof so made amply supports the verdict, and that no error of substance on the part of the court contributing to the result has been disclosed. It is not complained that the damages are excessive.

We are of opinion that the evidence supports the verdict and that the judgment is responsive to the merits. It will be affirmed.

In the Matter of the Estate of Jacob Dick, Deceased.

1. **WILLS—Construction of.**—In construing a will, and a codicil which the testator directs shall be taken as a part of such will, the court should read the will and codicil together, seeking to harmonize their various provisions, and should construe particular directions in the

light of the entire paper, so as to give effect to every part and to enforce the intention of the testator.

In Probate.—Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

WILLIAM McFADON, attorney for appellant.

A later clause in will repugnant to a former one modifies the former. *Jenks v. Jackson*, 127 Ill. 341; *Siddons v. Cockrell*, 131 Ill. 653.

If the provisions of the codicil had been contained in the will itself, they being the later clause, would have been treated as modifying the prior portion of the will, and the same result follows, treating it as a codicil. *Siddons v. Cockrell*, 131 Ill. 653; *Jenks v. Jackson*, 127 Ill. 341.

A codicil will be treated as an amendment of the former will, and to the extent of the changes thereby provided for, it is a cancellation of the provisions of the will. 2 Williams on Executors, bottom page 1081; 1 Williams on Executors, bottom page 8; 1 Williams on Executors, bottom page 162.

The intention of the testator as manifest by the words used must govern. *Banta v. Boyd*, 118 Ill. 168.

GOVERT & PAPE, attorneys for appellee.

While it is true, that where two parts of a will are irreconcilable the latter must prevail, still the true rule is recognized to be that different parts of a will can not be held to be irreconcilable unless, after the application of all rules of construction, it is found that the repugnancy is absolutely invincible. This is expressly stated in *Jenks v. Jackson*, 127 Ill. 341, cited by appellant.

See also to same effect *Roberts v. Roberts*, 140 Ill. 345; *Day v. Wallace*, 144 Ill. 256.

It is, however, elementary that in construing a will, full effect should be given, if possible, to every word and every clause of the will, and that it is improper and not allowable in the construction of a particular clause to confine

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our attention to the language therein contained, but that each clause must be construed in the light of the whole will. As Jarman on Wills, Ch. 51, in the seventh rule of construction, says, "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole." In *Bland v. Bland*, 103 Ill. 11, the court says: "But this looking at, and resting upon some particular clause or clauses of an instrument is not the right mode of constructing it; it must be looked to in all its parts, and the entire will be considered together, in order to ascertain what is its meaning." To the same effect is *Peoria v. Darst*, 101 Ill. 609; *Hamlin v. U. S. Express Co.*, 107 Ill. 443; *Day v. Wallace*, 144 Ill. 256.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The question arising in this case is as to the construction of the following will and codicil.

"I, Jacob Dick, of the city of Quincy, in the county of Adams and State of Illinois, being of sound mind and memory, do make, publish and declare this my last will and testament, to wit:

First. It is my will that all my just debts and funeral expenses be fully paid.

Second. I give, devise and bequeath to my wife, Maggie Dick, one-third of all my property, both real and personal, of which I may die possessed after the payment of all my debts and funeral expenses, to have, use and enjoy during her natural life.

Third. I direct that my executors hereinafter named, or such of them as shall qualify and act, or in case neither should act, then my administrator with the will annexed, shall take charge of all my property, both real and personal, except that part devised and bequeathed to my wife, and use so much of the same or of the income therefrom as shall be necessary for the support, maintenance and education of my three children, Anna Dick, Katy Dick and August Dick, until the youngest one, namely, August Dick, shall have attained the age of twenty-one years, and at that

time whatever may remain of my said property shall be equally divided amongst my said children without any regard to what may have been expended for their support and education respectively, it being my intention that each of my said children shall be reared and educated out of the common fund, to the end that the youngest shall share equally with the others, whatever remains of my said property after the cost of rearing and educating all of them is paid.

Fourth. It is my will that all of my children shall be well educated, and supported in a manner proportioned to the amount of my estate and their condition in life.

Fifth. I give, devise and bequeath to my said children in equal parts all that may remain of that part of my property devised and bequeathed to my wife at the time of her death, and in case she should die before the said August Dick attains the age of twenty-one years, then it is my will that my said executors or administrators with the will annexed shall hold and dispose of the same in the same manner hereinbefore provided for as to that part not bequeathed to my said wife.

Sixth. In case of the death of either of my children without issue before they shall arrive at the age of twenty-one years, then the survivors of such children are to have the portion hereby given to such as may so die without issue, and the estate so to be divided as hereinbefore provided amongst my said children as soon as the youngest of them or the survivors shall have attained the age of twenty-one years and not before, it being my intention that in no event shall any of my children have the control of the portion devised and bequeathed to them until the youngest of them or the survivors shall have attained the age of twenty-one years.

Seventh. I hereby appoint my wife, Maggie Dick, executrix, and my friends, Thomas Redmond and John Dick, executors of this, my last will and testament, hereby revoking all other and former wills, testaments and codicils by me made."

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CODICIL.

“Whereas, I, Jacob Dick, have this day made my last will and testament in writing, wherein I have provided that my children should not receive the property bequeathed to them until the youngest of them or of the survivors of them shall have attained the age of twenty-one years, now, therefore, I do by this writing, which I hereby declare to be a codicil to my said last will and testament and to be taken as a part thereof, order and declare that my will is that after my daughters or either of them shall have arrived at the age of twenty-one years and shall then marry, or if they shall have married before that time, they shall in that event receive the sum of three thousand dollars each, to be paid to them respectively by my said executors so soon as they shall have attained the age of twenty-one years and married, and until such time as they are married they are to receive their support and maintenance out of the common fund.

I hereby certify and confirm my said last will in all other things.”

The testator died December 22, 1876, leaving his wife and three children him surviving. The latter were Anna, aged thirteen, Kate, aged ten, and August, aged five years. Anna was married November 5, 1887, Kate was married April 10, 1888, and August became of age October 14, 1892.

When the girls were married, being over the age of twenty-one years they were respectively paid the sum of three thousand dollars as provided by the codicil, and when August attained his majority he received from the executrix a similar amount in order to equalize him with them. The Circuit Court held such payment was properly made, and that ruling presents the point for decision.

The position of appellant is, in effect, that the payment of three thousand dollars, provided for in the codicil to a married daughter being twenty-one years of age, was intended as an additional provision, and that the sum so paid should not be treated as a part of the share given in the will.

This view is untenable. Reading the will and codicil together, and seeking to ascertain what was the purpose of

the testator, it is very apparent that he intended to provide for his children equally.

He intended that, except so far as necessary for their support and education, the property should be kept intact until the youngest attained the age of twenty one years and then it should be equally divided, but by the codicil he provided that upon the marriage of a daughter, being then twenty-one years of age, or if married before, when she attained that age, she should receive a portion of her share, to wit, three thousand dollars. As to that sum she should not be required to wait until the youngest reached that age. This construction harmonizes the various provisions of the will and codicil and enforces the manifest intention of the testator.

The conclusion of the Circuit Court was right and its judgment is affirmed.

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Equitable Produce and Stock Exchange v. Christopher Keyes.

1. AGENCY—*Defined—An Improper Definition Criticised.*—An agent is one who undertakes to manage some affair for another by the authority and on account of the latter, who is called the principal, and to render an account of it; and an instruction which tells a jury to find that a person was acting as agent for the defendant, if they believe from the evidence that such person “was transacting business for the defendant” is vague and indefinite and lacks the precision which is required in a legal definition.

2. SERVICE OF PROCESS—*On Agent—Relation Must Exist at Time of Service.*—It is not necessary for a principal to give notice of the termination of the relationship to those transacting business with his agent, so far as the matter of service of process is concerned, and if a person served with summons as the agent of a defendant is not at the time of service the agent of such defendant, the service is bad.

3. PLEADING—*Corporation May Plead to the Merits after a Defeat on Plea Denying Agency of Person Served.*—When a suit is instituted against a corporation whose president and place of business are out of the county where the suit is brought, and process is served on a supposed agent of the company, the fact of agency may be put in issue, and if

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found against the company, leave should be given to plead to the merits.

Assumpsit, on the common counts. Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

A. N. YANCEY and FRANCOIS A. RIDDLE, attorneys for appellant.

FRANK W. BURTON, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The action of assumpsit was commenced by appellee against appellant, a corporation, in the Circuit Court of Macoupin County. A summons was issued directed to the sheriff of that county for service, and was returned served by delivering a copy to "F. C. Curtis, agent of said corporation, in said county, the president and secretary of said company not found in my county, this 3d day of September," etc.

The defendant filed a plea to the jurisdiction, averring that at the time of the commencement of the suit it was resident in Cook county, and that at the date of said service the said Curtis was not its agent.

The plaintiff replied that said defendant had a place of business in said Macoupin county, and at the time of said service the said Curtis was an agent of said defendant. The issue thus raised was tried by a jury and found for plaintiff.

The evidence tended to show that defendant was located in Chicago in the business of buying and selling grain, etc., on commission, and that Curtis was located at Carlinville, having direct communication with the defendant by private wire. When a person wished to buy or sell on the Chicago market he could give his order to Curtis, who would transmit it by wire to the defendant for execution.

The defendant claims that it always carried the account with Curtis, paid him a commission for the business and held him responsible in respect thereto, and that it did not know the person giving him the order.

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He was called the correspondent of defendant, and it is insisted he was in no respect its agent as that term is used in Sec. 5 of the practice act, relating to service on corporations.

An agent is one who undertakes to manage some affair to be transacted for another by his authority on account of the latter who is called the principal, and to render an account of it. Bouvier Law Dic., Vol. 1, p. 84.

We are not disposed to determine on the evidence now before us whether Curtis was the agent of the defendant, or whether he was transacting the business with plaintiff on his own account, his relation with the defendant being that of correspondent merely. A determination of that question may go to the merits of the case, and it is not proper now that we should indicate any opinion upon the point.

In several of the instructions given for the plaintiff the jury were told that if they believed from the evidence that at the time of service Curtis was "transacting business for defendant," then they should find for the plaintiff. The expression so used is quite vague and indefinite, and lacks the precision which is required in a legal definition. A jury might believe he was transacting business for defendant in a general way, and yet not be able to say that he was the agent of defendant as the law defines that term. Was he managing the business for defendant, upon its authority and for its account, the latter being the principal and having the right to call upon the plaintiff the same as though it had directly dealt with him, or did the plaintiff deal with Curtis only, and had he the right to call upon Curtis to respond in his own personal capacity?

We think these instructions were calculated to mislead the jury.

Another instruction was as follows:

"The court instructs the jury that if they believe from the evidence that F. C. Curtis was employed by the defendant to transact the business of the defendant at Carlinville, Illinois, as agent, prior to the service of the summons in this

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case, and that at the time of the service of the summons he was still transacting business in the same ostensible manner, and that prior to that time the defendant had given no notice to those transacting business with said Curtis that he had ceased to represent it in that business, then the jury should find for the plaintiff."

It is not perceived why it was necessary for defendant to give notice to those transacting business with Curtis that his relation with defendant had ceased so far as the matter of service is concerned. If he was not at the time of service the agent of defendant, the service was bad.

Possibly those who had been dealing with him as an agent might continue to deal with him in that capacity and in the way as formerly, and rely upon his agency until notified to the contrary. We say possibly this might be so, but if so it would be upon the ground that for some reason growing out of the particular circumstances the principal should be estopped to deny the agency. But how can such doctrine find application here?

The officer could not insist upon the supposed estoppel for he never had any prior dealing with Curtis, and he was put in no other or different position than if he had never heard of the supposed agency; neither can the plaintiff, for he has not been misled. He has not changed his position because he supposed the agency was continued. He has parted with nothing and lost no right by reason of anything done by the defendant in that regard. This instruction was erroneous, and in view of the testimony which tended to show that the relation of Curtis with defendant had ceased several days before the service, was calculated to mislead the jury. There was error in giving this instruction.

After the jury had rendered their verdict the plaintiff moved the court to impanel a jury to assess the plaintiff's damages, and the defendant entered a cross-motion for leave to plead to the declaration and tendered a plea of non-assumpsit. The court allowed the motion of plaintiff and denied the cross-motion. A jury was impaneled and the damages were assessed at \$5,425, of which the plaintiff remitted \$275, and took judgment for \$5,150.

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If the plea¹ filed by defendant denying that Curtis was its agent is to be regarded as a plea in abatement, pure and simple, as that plea was known and understood in the common law practice, then the jury which found the issue of fact for the plaintiff should have assessed the damages, and their failure to do so made it necessary to award a *venire de novo* since the omission could not be supplied by a writ of inquiry.

At common law when a plea in abatement is regularly put in, the plaintiff must reply to it or demur. If he reply and an issue of fact be thereupon joined and found for him, the judgment is peremptory, *quod recuperet*; but if there be judgment for the plaintiff on demurrer to plea in abatement or replication to such plea the judgment is only interlocutory, *quod respondeat ouster*. The judgment for defendant on a plea in abatement, whether it be on an issue in fact or in law, is that the writ or bill be quashed. 1 Tidd Pr., 641-2; 1 Chitty Pl., 465-6.

In the case of *Boggs v. Bindskoff*, 23 Ill. 66, the Supreme Court held that a plea traversing the averments of an affidavit in attachment was a plea in abatement and subject to the incidents of such a plea, and that where a jury found for plaintiff without assessing the damages it was error to call another jury for that purpose.

In the case of *Mineral Point Railway v. Keep*, 22 Ill. 9, service was had upon certain persons as agents of a defendant corporation and it was attempted by affidavits to show that the persons so served were not in fact agents of the corporation. It was held that the question could not be raised in that way, and in discussing the subject the court said: "We are not inclined to think the return of the officer, as to the fact of agency, when a corporation is sued, should be conclusive. Great injustice and ruin to incorporated companies might be the consequence, had the officer the undisputed power to select any person he might choose, as the agent of the company sued, and serve the process upon him. That he was the agent must be held to be a fact open to the country. An officer's return is not conclusive of all the

facts stated in it, as, where he returns upon a *fi. fa.*, money made and paid to the plaintiffs, the payment is a fact which may be contested. So in this case, the fact that J. R. Booth was the agent and Dexter the conductor, is not conclusively established by the return; it can be contested. Our statute authorizing service of process on an agent or conductor is an innovation upon the ancient practice, and no greater force and effect should be given to it than is absolutely necessary. When a party sues an incorporated company, whose president and whose place of doing business is out of the county where suit is brought, and causes his process to be served on one whom he chooses to consider the agent of the company, it is no hardship to require him to prove such person was the agent. We think, therefore, that the fact of agency could have been put in issue by plea in abatement of the writ, the defendants appearing for that purpose only. By such practice, no injustice can be done. If the issue is found against the company, and the fact of agency established, leave will always be given to plead to the merits."

While the plea here indicated is called a plea in abatement, it is evident the court did not regard it as subject to all the incidents of such a plea under the practice at common law. As was remarked, the statute authorizing service of process against a corporation upon a mere agent is an innovation upon the ancient practice, and it was necessary to devise some means whereby the fact of the alleged agency might be put in issue. We understand the court intended to lay down a rule of practice to be applied in future cases; hence, its remark that if the issue is found against the company leave will always be given to plead to the merits, should not be deemed *obiter dictum*. It does not appear that the court has ever withdrawn the remark, and so far as we are advised the rule indicated has been followed in practice.

But if the court had not said so we should be inclined to hold so. The plea is with reference to a matter unknown at common law, and while called a plea in abatement for the want of a better term, it should not be regarded as such

in respect to the form of the judgment. A defendant corporation should not be compelled to stake its right to contest the merits upon the result of the issue as to whether the person served was in fact its agent. We are of opinion that the court erred in refusing leave to file the plea of non-assumpsit.

The judgment will be reversed and the cause remanded for proceedings consistent with the views herein expressed.

Henry W. Buck and John J. Walsh v. Eddy Maddock and Katherine Maddock, by their next friend.

1. EVIDENCE—*Repetition of the Same Question Objectionable*.—It is proper to sustain objections to questions which are mere repetitions of those which have been asked and answered.

2. PARTIES—*Next Friend of Minor—Admissions by*.—The next friend of a minor plaintiff is not a party to the suit in such a sense that his admissions or declarations out of court should be received.

3. INSTRUCTIONS—*How Construed*.—Instructions should be construed as a whole and objections which are based upon strained and forced constructions of expressions selected without regard to the context will not be sustained.

4. INTOXICATING LIQUORS—*Action by Child for Death of Father—Exemplary Damages*.—In a suit against a saloon-keeper for causing the intoxication of the plaintiff's father, as a result of which he was killed, proof that such saloon-keeper sold or gave intoxicating liquor to the deceased while he was intoxicated, authorizes the jury to assess exemplary damages.

Trespass on the Case, for selling liquor to plaintiff's father. Error to the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

A. E. DEMANGE and H. W. HALL, attorneys for plaintiff in error H. W. Buck.

W. E. GAPEN, attorney for plaintiff in error Jno. J. Walsh.

Buck v. Maddock.

J. J. MORRISSEY and LIVINGSTON & BACH, attorneys for defendants in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellees declared against appellants in case, alleging that appellant Buck was the keeper of a dram shop in a house rented him for that purpose by appellant Walsh; that he furnished intoxicating liquors to Edward Maddock, father of appellees, causing him to become intoxicated, in consequence of which the said Maddock went upon a railroad track, and failing to exercise proper care for his own safety, was killed by a passing train. A plea of not guilty was filed and upon trial by jury the issue was found for appellees and their damages assessed at \$1,550. .

A motion for new trial by appellants was overruled and from the judgment thereupon rendered they have prosecuted this appeal.

The one question of fact material to recovery, as to which the evidence was conflicting, was whether the appellant Buck did furnish the liquor which caused, in whole or in part, the fatal intoxication. A witness, Robbins, testified on behalf of appellees, that he and deceased were in Buck's saloon and that the deceased was furnished ten or fifteen drinks of beer and whisky by Buck. This was between 5:30 and 7 P. M. The witness went away, leaving Maddock there, and the latter lost his life that night. The testimony of this witness is contradicted by one Dunkle, called by the defense, and to some extent by other testimony, including that of Buck himself. It is supported to some extent by corroborating circumstances.

It was shown that Robbins was then under an indictment for burglary, and as to Dunkle, there appeared on his cross-examination some things calculated to impeach him. There was no doubt that the deceased was much given to drink; that he frequented this saloon; that he was there at the time mentioned by Robbins and Dunkle, and that he was there about noon of the same day, and that he was under the influence of liquor that morning. The jury had the oppor-

tunity of seeing the witnesses and so had the trial court, and could determine better than we where the greater credit was due. In view of the evidence as it appears in the record, we can not, according to the well settled, applicable rule, interfere with the verdict on this point.

As to the amount of actual loss of support sustained by appellees; the testimony shows that the deceased fell far short of his duty as a parent. He had no trade or vocation, and depended on uncertain and irregular employment as a laborer. At and for a short time before his death he was working in a packing house. His elder child was born before marriage, and neither the mother nor children had received such support as they were entitled to, nor as much as he might have given them if his habits had been good. Yet he did not wholly desert them, nor utterly neglect them, and it can not be said there was reason to suppose he would never have done better. The appellees suffered a nominal loss at least. It was to be presumed that he would to some extent discharge the duty he owed them, and it was wholly possible and perhaps not improbable that he would do so to the best of his ability. There was some evidence, which, if believed by the jury, would tend to the conclusion that he so intended.

The jury may have reasonably thought that the appellees were deprived of something substantial in the way of support, prospectively at least. Such would be presumption from a legal standpoint at any rate, and the amount assessed can hardly be considered excessive regarding actual damages only.

But if the jury believed Robbins, there was ground for exemplary damages; for, according to his testimony, the deceased was furnished with liquor by appellant Buck when he was obviously intoxicated. *Betting v. Hobbett*, 142 Ill. 72.

The brief of appellants presents various objections to the action of the court in admitting evidence, but we find nothing substantial in that respect. For example, it is urged that the court erred in permitting proof that the de-

ceased was industrious when sober, because there was no allegation in the declaration that he was an habitual drunkard, and also in permitting proof of what deceased had done in the way of supporting his wife.

Such proof tended to show the ability and disposition of the man when in a normal condition to discharge his duties to his family. It is urged the court erred in refusing to allow appellants to ask Robbins, on cross-examination, whether he had not been given money by plaintiff's counsel to get his clothes. The question was general. "Didn't you get some money paid to get your clothes here?"—without any limitation as to where, or from whom. He had previously answered several questions on that line, and the court had required one of the questions to be framed so as to state from whom the supposed contribution had come. There was no error in this action of the court, nor in the like ruling on another repeated question as to whether he had not been furnished free drinks at the saloon of a relative of the appellees—he having once answered such a question in the negative. It is within the province of the court to sustain objections to questions which are mere repetitions of those which have been asked and answered.

It is said the trial court erred in refusing proof of admissions made by the mother of the appellees, who was acting as "their next friend" in this suit. She is not a party to the suit in such a sense that her admissions or declarations out of court should be received. She was a witness, and if it was desired to prove that she made the supposed statements by way of impeachment, the proper foundation should have been laid by asking her whether she had so stated, fixing the time and place and persons present. This was not done. The point is not well taken.

Much criticism of the instructions given for plaintiffs is found in the brief, but the objections are mainly based upon a strained and forced construction of some expressions selected without regard to the context. As to the first, it is said that it is dictatorial and mandatory, and coercive—quite a misapprehension, as we think. Another complaint

is that it permits a recovery if the said Maddock died in consequence of his intoxication, when the declaration avers that he was killed, an entirely different matter, as counsel suggests. We are unable to appreciate the force of the objection.

As to the second, the point urged is that it authorizes the jury to assess any damages which they may believe from the evidence the plaintiffs had sustained without a limitation to their loss of support, but the very sentence from which these words are taken is predicated upon an injury to the means of support.

Equally unsubstantial are the objections to the third, fourth and fifth.

As to the sixth, it is urged that it assumes that defendant Buck did sell liquor to Maddock, because the word "the" precedes the words "intoxicating liquor," etc. A further objection is that the instruction assumes that in the death of their father the appellees had sustained damages to an amount in the loss of means of support.

Both objections are too refined for the practical administration of justice.

A third objection urged to this instruction is that it advises the jury they might allow exemplary damages if they found that defendant Buck in person gave Maddock intoxicating liquors when he was already under the influence of such liquors, thereby causing the drunkenness complained of. As applied to the evidence that Buck gave Maddock ten or fifteen drinks of beer and whisky within a period of an hour and a half, during a part of which time "he was under the influence of liquor," the instruction was not improper. *Betting v. Hubbett, supra*. Counsel argued that the phrase "under the influence of liquor" is too vague and is not equivalent to *drunk* or *intoxicated*. This expression is often used as a mere euphemism of those harsher terms and is generally understood to mean the same thing. But were this not so, when the instruction is read in the light of the evidence offered by plaintiff the objection is not tenable. If one plies another with so much drink within so

short a time, the effect being apparent, his action is within the reasoning and principle of the rule as laid down by the Supreme Court in the case cited. In this connection complaint is made of an instruction given by the court on its own motion, to the effect that vindictive or exemplary damages could not be awarded unless the plaintiffs had a case entitling them to actual damages, to which we perceive no valid objection. If the proof just referred to was credited by the jury they would have been warranted in giving exemplary damages; yet as already observed, it is by no means to be assumed that the verdict necessarily includes such an allowance.

It is urged that the seventh is obscure and that it assumes that the intoxication was the cause of the death, and that there was some injury to the means of support. There is no obscurity, nor any harmful assumption. It was not doubtful that the death was caused by the intoxication, and the instruction in terms limited the recovery to such injury to means of support as was shown by the evidence. To the ninth it is objected that in stating to the jury that it is the duty of a father to support and educate his minor children if able to do so, the instruction tended to advise the jury that there was testimony that the father did support the plaintiffs and was therefore misleading. We think not. Moreover the instructions given at the instance of defendants were very full and positive to the effect that whatever may be the legal duty of a father, these plaintiffs could be allowed only for such loss as they had sustained, in view of the character, habits and ability of their father as shown by the proof. Error is urged upon the modification of two instructions by adding the words "and means of support" after the word "loss," in one, and by adding the words "in whole or in part," after "support" in the other. It is said the first modification blunted the point of the instruction and rendered it meaningless. We see nothing in the objection. It is said as to the second modification that the declaration averred a total loss of support and that this instruction, as so modified, would permit a recovery for a

partial loss of support, which counsel suggests can not be done. The greater includes the lesser; the whole includes a part. As to the first refused instruction the brief answers the objection; the point was embodied in the defendant's third which was given. It is urged the second refused instruction should have been given. The point thereof is sufficiently covered by the last clause of the third and by the seventh and eighth which were given. No further objections are made in the brief.

We have carefully examined the abstract and have referred somewhat to the record, and after thoroughly considering all the points raised we are of opinion no substantial error appears and that the judgment must therefore be affirmed.

Bert Heyen v. Owen Ward.

1. LANDLORD AND TENANT—*Tenant Can Not Deny Landlord's Title.*—In a suit to collect rent for part of a tract of land occupied by the defendant, if it be proved that it was plainly understood that if defendant took any of the land, he must take it all of the plaintiff, and thereupon he took possession of the entire tract, he is estopped to deny that he held under the plaintiff.

Assumpsit, for rent. Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

ZINK & KINDER, attorneys for appellant.

PEEBLES & PEEBLES, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit to recover a sum alleged to be due plaintiff for rent of land leased to defendant.

On trial by jury the plaintiff recovered a verdict for \$240, the amount claimed.

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Judgment was entered according and the defendant has appealed. The land in question, forty acres, was a part of a tract of one hundred and twenty acres which plaintiff had owned for many years. For a period of several years one McClure was in possession of the whole tract as tenant of the plaintiff. In August, 1893, defendant went to plaintiff, who lived in another county, and inquired whether he would lease the land, to which plaintiff replied that he would lease the entire tract at \$3 per acre per annum—that if defendant took any of it he must take all, and referred him to his attorney who told him in substance the same thing. Defendant said to the attorney that one Whitlow claimed the forty in question and the attorney replied that Whitlow's claim was worthless and that if he took any of the land of plaintiff he must take it all, to which proposition defendant assented and went away and afterward took possession of the whole tract, cultivated it for two years, paid plaintiff the stipulated rent for eighty acres but refused to pay for the forty. This is the case as made by the plaintiff, substantially. It is true that the plaintiff, who is a very old man, having attained the age of ninety-five years, had great difficulty in making a clear and coherent statement of what occurred between him and the defendant—wandered a good deal in his direct examination, and on the cross-examination was led into some contradictory statements—but when his testimony is taken in connection with that of the other witnesses the jury were warranted in believing that the defendant clearly understood the plaintiff would not rent him a part of the tract unless he would take it all under the plaintiff, and that defendant, so understanding, did take the entire tract. In so doing he acted in bad faith with the plaintiff for he already had a lease for the forty from Whitlow.

He contradicts the plaintiff as to what occurred between them, but it was for the jury to say which was the more credible.

If, as claimed by the plaintiff, it was plainly understood that if defendant took any of the land he must take it all of the plaintiff, and thereupon, concealing his arrangement

with Whitlow, he took possession of the entire tract, he is estopped to deny that he held under the plaintiff. Some complaint is made of the instructions, but we find nothing substantially wrong.

The judgment is no doubt responsive to the merits and it will be affirmed.

E. C. Perkins v. George W. Webb.

1. JUDICIAL SALES—*Effect of Sale Under Several Executions, One of Which is Void.*—Where several executions were levied upon property and a sale was made pursuant to such levies, the fact that one of the executions was void, does not annul the sale.

2. EXECUTIONS—*Effect of Mistake in Copies of.*—A copy of an execution left with an officer of a corporation, certain shares of whose stock were levied upon, was dated May 11, 1893, when it should have been dated May 11, 1894; it recited a judgment rendered December 20, 1893, and was indorsed by the constable as received May 11, 1894. *Held*, that it was so plain that the date given in the copy was a clerical error, that no one could be misled thereby, and that a sale made under such execution was not rendered void by such error.

3. SET-OFF—*Not Allowed Against Amount Bid at a Judicial Sale.*—A purchaser at an execution sale must pay the full amount of his bid and can not set off a claim against the plaintiff in such execution.

4. ATTORNEYS—*Have no Implied Authority to Purchase at Judicial Sales.*—An attorney has no implied authority to purchase for his clients, property sold in pursuance of a judgment in their favor secured by him.

Assumpsit, for amount of bid at execution sale. Appeal from the Circuit Court of Logan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

W. R. BALDWIN, attorney for appellant.

S. L. WALLACE, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This case was here at a former term. (60 Ill. App. 91.) There was then involved only the question whether the declaration disclosed a good cause of action.

A trial in the Circuit Court after the case was remanded resulted in a judgment in favor of the plaintiff for the unpaid balance of the bid, from which the present appeal is prosecuted by the defendant.

The first objection argued in the brief is that one of the executions was void as to Schneider, one of the defendants therein, because he was not served with summons. Conceding this, it does not follow that the sale is void. There were four executions, all of which were levied upon the stock, and the sale was made pursuant to such levies. As to three of the executions no defect is suggested, and the levies thereunder were well made. The other was good as to one of the defendants who owned a part of the stock. Aside from this, appellant acted as the attorney of the plaintiffs in obtaining that judgment, and ought not to be heard to make the objection in order to escape liability on his bid.

Another objection urged is that the copy of the execution left with the officer of the corporation when the levy was made was faulty because the date given in the copy was May 11, 1893, when it should have been May 11, 1894. The execution recited a judgment rendered December 20, 1893, and the indorsement of the constable showed that it came to his hands May 11, 1894. Manifestly, therefore, the date given in the copy was a clerical error, and this was so apparent that no one could be misled thereby. But as already suggested, if this execution were left out of consideration entirely the other three would support the sale.

It is urged the court erred in not permitting appellant to explain how he arrived at the figure named by him in a letter written to Snow, Church & Co. This seems to be not important in the view we take of the case. Nor was it error to exclude offered evidence as to what would be a reasonable fee for the services of the appellant as an attorney in the premises.

The constable seeking to enforce the bid is not concerned in that matter and should not be required to take any part in respect thereto. He may call on the bidder to pay over the

amount of the bid and may not be involved in any expense or trouble in resisting such a counter-claim. He must collect and pay over to the justice and then his responsibility is ended.

No error is perceived in the refusal of the court to permit appellant to show for whom he intended to buy the stock, nor on whose account he afterward tried to sell it. He had no authority from the execution creditors to buy it on their account, and as his action has resulted in discharging the debtors he should answer for the amount of the bid.

It was optional with the creditors to take the stock off his hands or to require the money.

The court properly refused to allow appellant to testify whether he relied upon a notice given him by appellee that the stock would be re-sold at his expense, there being no offer to prove that thereby appellant lost an opportunity to sell the stock, or that he was injured in some other way.

We perceive no error in giving instruction No. 1, asked by appellee, of which complaint is made.

It properly states the appellee's theory of the case and is not misleading. Nor was there error in modifying Nos. 6 and 7, asked by appellant, for without the modification they should not have been given.

It is urged that the court erred in refusing Nos. 8, 9, 10, 11, 12 and 13 asked by appellant, but no reason is suggested why any of them should have been given except the last. That instruction was to the effect that even though appellant bid in the stock for himself, his clients had the right to claim the benefit of the bid and take the stock, and if appellant "was acting in good faith with his clients in making the purchase, then they would not be permitted to reject the purchase if the stock proved to be worthless." The proposition amounts to this, that the clients would be bound to take the stock even though they had not authorized the attorney to buy it, which, of course, is not the law.

The final objection is that a new trial should have been granted because the verdict is contrary to the evidence. Enough has been said to indicate in substance what the

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evidence was. It is not necessary, therefore, to follow in detail the argument on this point. We see no sufficient reason for the position thus taken. Indeed, we think as the record appears the court properly denied the motion. The judgment is affirmed.

Prairie State Paper Company v. H. W. Sharp.

1. PRACTICE—*Objections to Evidence—When They Must be Specific.*—A general objection to testimony which is pertinent to the merits of the plaintiff's case and in general competent to be introduced in such cases, will not suffice to save the point in the Appellate Court that the declaration in the particular case is not broad enough to admit such testimony.

2. INSTRUCTIONS—*Should Not Decide Questions of Fact.*—An instruction that the cost of cleaning out sediment deposited by the water from defendant's mill in plaintiff's tiles and lateral ditches could not be considered by the jury in assessing damages if such sediment was of such a nature that it would have been washed out of the tiles and ditches by water falling in rains, invades the province of the jury by assuming to control them upon a question of fact and may properly be refused.

Trespass on the Case, for putting foul water and refuse matter in a water course. Appeal from the Circuit Court of Christian County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

STATEMENT OF THE CASE.

Judgment below, \$550, in favor of appellee in an action on the case, for flowing foul water and refuse matter from appellant's paper mills into a water course which ran through appellee's farm.

J. C. McBRIDE, attorney for appellant.

DAVID M. SHARP and J. E. HARRISON, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The principal ground upon which reversal is asked is, the court permitted appellee to introduce testimony tending to

establish damages not specifically alleged in the declaration or not falling within the averments thereof.

The facts proven were competent for consideration as elements of damages, had the declaration been so framed as to include them.

The objections preferred to the Circuit Court against the introduction of the testimony were general only, and did not call the attention of the court to the fact that the ground thereof was the insufficiency of the pleading. Had this ground of the objections been developed and found to be well taken, the court would have sustained them, and the plaintiff could have obviated the difficulty by making the necessary amendments to his pleadings.

The purpose of the statute authorizing amendments to be made in declarations, pleas, etc., is to secure a full and fair hearing and speedy determination of the merits of controversies between litigants.

A general objection to testimony which is pertinent to the merits of the plaintiff's case, and in general competent to be introduced in such cases, will not suffice to save the point in the Appellate Court that the declaration in the particular case is not broad enough to admit it. Nor was the ground of the objections now sought to be urged in this court made known to the Circuit Court in the motion for a new trial. Had that been done, the difficulty, which is merely technical, might have been removed by amendment. Such objections can not be urged for the first time in this court. *Libbie, McNeal & Co. v. Scherman*, 146 Ill. 542; *I. & St. L. R. R. Co. v. Estes*, 96 Ill. 470.

The objections to the testimony of witnesses who were allowed to testify they saw water which came from appellant's establishment after it had passed through appellee's farm and some distance northwest from his place, and that it was filthy and produced foul odors, etc., seems to us to question the weight rather than the competency of such testimony.

Moreover, we find it was abundantly proven by testimony given by other witnesses, the competency whereof is not

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questioned, that the water when upon appellee's farm was discolored, emitted foul odors, deposited a filthy sediment, was unpleasant and unhealthy, etc.

The gist of all the complaints that the court erred in giving instructions for the appellee is, that the jury were authorized by the instructions to consider elements of damages not covered by the allegations of the declaration.

If we are right in the view heretofore expressed that the appellant can not here be heard to complain that proof of such damages were admitted, it would follow we could not hold it was error for the court to instruct the jury as to the law relating thereto.

The court gave twelve instructions for the appellant and refused four that were asked in that behalf. Numbers three and four, which were given, covered all that was proper to be given in number thirteen, which was refused.

Number fourteen was properly refused, for the reason the court had correctly stated the rule it sought to announce in numbers two and seven, which were given.

Number fifteen was properly refused. It was in effect that the cost of clearing out sediment deposited by the water from appellant's mill, in plaintiff's tiles and lateral ditch, could not be considered by the jury or recovered by the plaintiff if such sediment was of such nature it would have been washed out of the tile and ditches by water falling in rains.

It did not purport to enlighten the jury upon any rule of law. It invaded the province of the jury by assuming to control them upon a question of fact, and in addition, in our judgment, was wrong upon that question.

Number five, which was given, contained all embraced in number sixteen (which was refused) proper to be given.

There is no reason we should interfere with the judgment on the grounds it is against the merits. Judgment affirmed.

Terre Haute & Ind. R. R. Co. v. F. O. Hybarger.

1. INSTRUCTIONS—*Improper Marking of—When Ground for Reversal.*—In a closely contested case an instruction which correctly stated the law upon an important branch of the case was read to the jury, marked “refused” and given to the jury with other instructions marked “given.” No other instruction covering the same point having been given, *it was held* that the facts stated justified a reversal of the judgment.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

THOMAS J. GOLDEN and JOSEPH E. DYAS, attorneys for appellant.

DUNDAS & O’HAIR, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$500 recovered by appellee for personal injuries received by him in a collision with a train operated by appellant upon its road.

The questions of fact as to whether appellee approached the crossing with proper care and whether the appellant was negligent in running recklessly and in failing to give proper signals were closely contested. It is unnecessary to say more on these points, than that the evidence was very conflicting and therefore it was especially important that the court should accurately instruct the jury as to the law of the case.

The first instruction given for plaintiff is complained of because, as is averred, it singles out for special comment the testimony of the plaintiff. We think it is objectionable in this respect, but perhaps not enough so to require a reversal of the judgment. Another objection urged is that the court marked as refused an instruction asked by defendant and read it to the jury, and that the instruction so read by

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the court and so marked refused was taken by the jury with the other instructions which were given. The instruction referred to was upon an important branch of the case—the duty of the plaintiff to exercise due care in approaching the crossing, and it is not denied that it correctly stated the law upon that point. So the question is, what should be said of this, probably inadvertent, action of the court in marking as refused a correct proposition of law and giving it so marked to the jury. The other instructions taken by the jury were all marked given, and if the jury took the trouble to examine the instructions they must have discovered that while the others were marked given, this was marked refused, and it is presumable, at least, that they understood the court did not approve of this instruction. No other instruction covering the same point was given.

It is impossible to say that the case of the defendant was not prejudiced by this action of the court. It could not be so said unless it were known that the jury did not discover that the instruction was so marked. This is not known. The judgment will be reversed and the cause remanded.

Kingman & Company v. Frank Glover.

1. MORTGAGE—*What Not a Release of.*—Property which is omitted from a new mortgage given to secure an old debt is not thereby released from a prior mortgage given to secure the same debt unless some valid understanding to that effect is had.

Replevin.—Appeal from the Circuit Court of Moultrie County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed November 21, 1896.

MILLS BROTHERS, attorneys for appellants.

W. G. COCHRAN, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was replevin for two horses. On a trial in the County Court before the judge thereof, a jury being waived, the issues were found for defendant, and a writ of *retorno* was awarded, from which judgment the plaintiff has appealed. In July, 1891, the plaintiff sold to one Snyder and N. A. Glover, the wife of defendant, a threshing outfit and received in payment the notes of said Snyder and N. A. Glover secured by a chattel mortgage on the property sold and the property in dispute which belonged to the defendant, who was doing business in his wife's name. The mortgage was executed by Snyder, alone, but with the consent of defendant, and was recorded in Moultrie county, where Snyder and the Glovers resided and where the property was. During the latter part of the season Snyder and defendant undertook to ship the threshing machine to the State of Minnesota, but the plaintiff would not permit the property to go out of this State until a mortgage was executed in Minnesota.

Snyder had gone there, and defendant, being in Peoria, where the machine had been stopped and where the plaintiff's home office was located, arranged with plaintiff that a new mortgage should be executed by Snyder, in Minnesota, and then the machine should be forwarded.

Accordingly a new mortgage covering the same property as the first was prepared and sent to Snyder, who executed and returned it, and then the threshing machine was shipped to him.

The horses always remained in the custody of defendant in Moultrie county. It was the defense, that by force of this arrangement between defendant and plaintiff the horses were released. It very clearly appears that they were included in the new mortgage. It also appears that the defendant saw the new mortgage and according to the testimony of Jameson, the agent of plaintiff, it was given to defendant to send to Snyder. Defendant says it was understood the horses were not to be put in it, and that it was to be in satisfaction and release of the first mortgage.

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He admits that he saw the new mortgage, but thinks the horses were not included therein; they were, however, and he must have known it; and this fact, together with the positive testimony of Jameson that the new mortgage was to cover all the property in the first, very clearly outweighs the testimony of defendant. If the horses were not put in the new mortgage, they would not be released from the lien of the first unless some valid understanding was had to that effect. It is difficult to see why the plaintiff should have consented to such an arrangement or what consideration there was in the transaction moving to plaintiff for such consent. The plaintiff did not wish the machine taken out of the State, and had nothing to gain by the removal. It was the defendant and Snyder who wished it, and merely for their accommodation was it permitted, on the condition that a new mortgage, valid in Minnesota, should be given. Why should the plaintiff, under such circumstances, also release the lien upon the horses? It was not necessary to do so in order to accomplish the desire of Snyder and defendant in reference to the machine, nor did any benefit move to the plaintiff or any disadvantage to defendant which might operate as a consideration for a release. There was no formal release, and the circumstances unquestionably indicate there was no intention on either side that the transaction should effect a release, nor was there any consideration therefor.

We are constrained to hold that the judgment is erroneous. It will therefore be reversed and the cause remanded.

Lewis Beal, Executor, etc., v. George W. Pratt.

1. PRACTICE—*What Amounts to Waiver of Objections to Affidavit for Continuance.*—Where a party objected to the sufficiency of an affidavit asking for a continuance on the ground of the sickness of a witness, and such objection being overruled, admitted that the witness, if present, would testify as stated in the affidavit, *it was held* that such admission amounted to a waiver of any objection to the sufficiency of the affidavit not specially assigned.

2. TRIALS BY THE COURT—*Presumption in Favor of Finding.*—Where a case is tried by the court without a jury, it is presumed that all incompetent and irrelevant evidence is disregarded in reaching a conclusion, and if the record contains enough that is competent and relevant to support the finding it will be sustained, unless it affirmatively appears that the court relied upon incompetent or irrelevant evidence or erred in some other respect.

Assumpsit, for nursing, etc. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

W. S. EDWARDS, attorney for appellant.

A. M. BARNETT, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$235 obtained by appellee against the estate of Aaron Beal, deceased, for service rendered. It is urged as a ground of reversal that the court erred in permitting the plaintiff to prosecute as a poor person.

It seems somewhat absurd to consider such a question after the plaintiff has shown a right to recover and has obtained a judgment for his cost against the defendant whose complaint or apprehension was that he might lose his costs unjustly expended unless security should be given. On the other hand if the defendant had succeeded he would have no practical way of relief. It has been uniformly ruled that an application of this sort is addressed to the sound discretion of the court. From the meagre statement of the affidavits as found in the abstract we are not prepared to say the judicial discretion was abused in this instance.

Next it is urged that the court erred in holding sufficient an affidavit for continuance presented by the plaintiff. The abstract does not profess to set out the entire affidavit but from what is presented, it appears that the testimony of the witness was material, that she had been subpoenaed, and was not in attendance because of sickness.

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It is suggested that the affidavit does not disclose the residence of the witness, and perhaps she was a resident of another county or was ill when the suit was brought, in which case her deposition might have been taken. Whether either of these conditions should be inferred, could be better determined if the entire affidavit and the certificate of the physician were set out in the abstract. Nor does it appear that the objection now urged was presented to the court; but the defendant, to avoid a continuance, admitted that the witness, if present, would testify as stated in the affidavit. We are inclined to hold that this was a waiver of any objection not specially assigned. When such an affidavit is presented the court should not be required to perform the work of counsel in searching for objections, and the record should show what particular objections were made, so that the court might pass upon them; and where the affidavit is admitted to save a continuance, all objections not so pointed out should be considered waived.

The point must be held untenable.

By consent of parties a jury was waived and the cause submitted to the court.

It is now insisted that the evidence does not support the finding. It appears that for some three months the plaintiff rendered the services of a nurse to the said Aaron Beal, who was then suffering from an incurable disorder of which he subsequently died.

Dropsy was one of the prominent symptoms and it was necessary to bathe and dress the swollen parts and to render other personal attentions essential to the comfort of the patient, which need not be detailed, and it appeared that such service was worth from \$2.50 to \$3 per day. There was evidence tending to show that the plaintiff had at the request of Mr. Beal given up other employment and undertaken this service at an agreed price of \$3 per day, and that Mr. Beal expressed himself more than once as being well satisfied with the service as rendered.

Such work is not usually considered very desirable. There is much about it that is quite unpleasant to most persons

and in this instance it seems that the plaintiff, who was the husband of one of the daughters of the sick man, was for some reason selected by him in preference to others of his family and that but for the active and persistent interference of those others the employment would have been continued. But by means of such interference he was induced to dismiss the plaintiff. It is argued now that the evidence shows that the plaintiff's wife was at the house of her father during all this time and that her board should be deducted from the price agreed upon.

It appears she was there before the plaintiff undertook the service, he being then at another place and otherwise employed. There is nothing to show that there was any purpose in the mind of her father to charge her with board. It is to be presumed there was not, under the circumstances disclosed. It is also urged that the plaintiff spent a good part of his time hunting for medicinal herbs and roots which he sold at a considerable price, and that while so engaged he not only neglected his patient but used a horse and wagon belonging to him, for which a charge should be made. It is uncertain, from the proof contained in the abstract, how much time was devoted to such purposes, and whether the plaintiff sought or obtained anything except for the use of Mr. Beal, or, if so, how much it was worth. Be this as it may, the evidence tends to show that he did not neglect his duties as a nurse, and that no objection was made by Mr. Beal to the use of the horse and wagon, or to the amount of time so spent by the plaintiff. The court was probably justified in believing that this matter was very much exaggerated and that there was really nothing substantial in it.

The executor and one or more of the other parties interested in the defense, testified as to acts and statements of the plaintiff, and the latter appeared, on rebuttal, as a witness on his own behalf. It is argued that he was permitted to go into matters not within the range of such testimony of the interested witnesses for the defense. Perhaps it may be said that he did go beyond the line in this respect, but as appears from the proposition of law held by the court, his testimony

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was treated as restricted to the conversations and transactions mentioned by such interested witnesses. Generally, where a case is tried by the court without a jury, it is presumed that all incompetent and irrelevant evidence is disregarded in reaching a conclusion, and where the record contains enough that is competent and relevant to support the finding, it will be sustained, unless it affirmatively appears that the court relied upon the incompetent or irrelevant evidence or erred in some other respect.

This is one of those unfortunate cases where the heirs of an estate have disagreed, and where the value of the testimony depended in an unusual degree upon the manner and appearance of the witnesses, and upon other circumstances that can not be reproduced in the record. The finding of the court is to be treated as having all the weight of the verdict of a jury. We see no good reason for interference, and the judgment will be affirmed.

Springside Coal Mining Company v. Dora Grogan, Administratrix.

1. **NEGLIGENCE**—*Can Not be Shown by Matters Occurring Subsequently.*--The question of negligence must be determined by what occurred before and at the time of the injury, and not by what was done afterward; but matter occurring subsequently is not objectionable if brought out upon cross-examination.

2. **SAME**—*When Combined with Accident.*—No one is liable for a pure accident, but if a person be injured by the combined elements of accident and the negligence of another, while in the exercise of due care and caution for his own safety, and it be shown that such negligence was the proximate cause of the injury, the party guilty of the negligence may be made to respond in damages.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Christian County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

STATEMENT OF THE CASE.

This is an appeal from a judgment entered against the appellant company in an action under the statute, brought

by Dora Grogan as administratrix of the estate of Thomas Grogan, deceased, to recover damages for the benefit of the widow and next of kin of said deceased, whose death, as it was alleged, was attributable to the negligence of the appellant company.

We reversed a judgment rendered for the sole benefit of Dora Grogan, as widow of the said Thomas, against the said appellant company (appellant company v. Dora Grogan, 53 Ill. App. 60), and the statement then made of the facts need not be here repeated, but we must add thereto that in the case at bar plaintiffs charged that certain planks had been so laid across the opening or mouth of the air shaft as to prevent the entrance of any object of such size or weight as might fall upon and injure the workmen, and that the mouth of the pit or shaft was thus protected at the time said Thomas Grogan went into the shaft to work on the day of his death, and that after he had gone down into the pit, and without his knowledge, the planks were removed by the employes of the appellant company and the pit left open, so that when the barrel blew or fell from the truck there was nothing to obstruct its entrance into the pit, and that it did so enter the mouth of the pit and from thence dropped to the bottom and there struck and killed said Thomas Grogan.

Upon a hearing before a jury, judgment was entered against the company in the sum of \$3,700, and it has prosecuted this appeal.

ANTHONY THORNTON, attorney for appellant.

DRENNAN & HOGAN and H. J. HAMLIN, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

It is complained that the court improperly admitted proof that the company on the day after the death of Grogan placed a wire netting over the air shaft. The rule drawn from *Hodges v. Percival*, 132 Ill. 56, that prior negligence

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can not be shown by precautions taken after the injury complained of and that such subsequent precaution ought not to be proven for the reason the jury are apt to consider it an admission of negligence, is invoked in support of the objection.

We think no error occurred in this regard. A witness introduced in behalf of the appellant, testified it was essential the deceased and others, while at work in the pit, should be supplied with fresh air, and gave it as his opinion, based upon long experience in mining, that the mouth of this shaft could not have been protected by planks without affecting the supply of air and endangering the health and lives of the workmen, and further that in his judgment the entire open space of this shaft should have been left wholly unobstructed in order the supply of fresh air should be sufficient.

Appellee was then allowed to show by cross-questions, propounded to the same witness, that a wire screen was put over the mouth of this air shaft on the next day after Grogan was killed, and that it did not obstruct the passage of the air, and that the workmen did not suffer from any lack of pure air. The testimony thus elicited was fairly within the scope of legitimate cross-examination. The testimony in chief of the witness tended, and was intended, to lead the jury to the conclusion, the appellant company could not by any reasonable means have covered the mouth of the shaft so that the barrel could not have entered it without depriving the workmen of the necessary supply of pure and fresh air and thereby endangering the health and lives of such workmen, and the cross-examination was only intended to bring out facts in rebuttal of such conclusion.

Moreover the court instructed the jury "that the question of negligence must be determined by what occurred before and at the time of the injury and not what was done afterward."

It is next contended by counsel, no wrongful act, negligence or default on the part of the company was proven. We can not assent to this. It was necessary the air shaft

should be kept open sufficiently for purposes of ventilation, and yet equally necessary, even to a casual observer, the safety of the workmen at the bottom of the shaft required it should in some manner be protected at the top so that nothing dangerous to the workmen could fall into it. This might have been accomplished by building a curbing or fencing about it high enough to protect the opening, or perhaps by a wire screen stretched across it.

The company for purposes of its own convenience adopted the plan of laying a track across the mouth of the air shaft and running thereon a car or truck upon which it conveyed in a barrel the earth, stones, water, etc., brought up from the hoisting shaft. In this way the earth and substances from the pit could be conveyed more conveniently and with less expense, to the place where the company desired to deposit them, and as fencing or curbing in the shaft would have obstructed or prevented the passage of the car, neither was erected, nor was a wire screen put across the opening.

The safety of the workmen, not intentionally but actually, was subordinated to the convenience of the company and to the reduction of the cost of the work of sinking the shaft.

But it is urged the deceased knew of the plan adopted for doing the work and the danger to which he was thereby exposed, and that without complaint, or promise that a safer mode would be adopted, he continued in the employment, and, hence, it is argued, recovery must be denied under the authority of the rule announced in *Peoria Bridge Co. v. Loomis*, 20 Ill. 250, and *City of Chicago v. Martin*, 49 Ill. 246, as governing in such state of case.

The principle sought to be invoked has no application if the injury complained of resulted from acts of negligence so gross in character as to imply a reckless disregard of the consequences, and justify the presumption of willfulness or wantonness in the legal sense and meaning of those words.

But we do not conceive it necessary we should assume the jury entertained the view that the negligence of the company was so gross as to warrant the implication of will-

fulness or wantonness. We more readily accept the position of the appellee that the company attempted to protect the mouth of the shaft by placing and keeping planks there, and that the deceased knew this and relied upon it for safety, and that such planks were thoughtlessly removed by some employe of the company after deceased went down to his work on the fatal day. Upon the point whether the covering was so protected or the planks so removed, there was sharp conflict in the testimony, from which it was the duty and the peculiar province of the jury to ascertain and determine the truth.

It is evident the deceased understood the mouth of the shaft was covered and protected and that he relied upon such covering for safety, for when he was advised by his fellow-workmen that something was falling down upon them from above, he was working at the bottom of the hoisting shaft and he immediately fled to the air shaft as a place safe from such dangers.

There was testimony warranting the jury in adopting the conclusion that the position of the appellee was correct, and we are content to accept the result of their deliberations.

Nor do we think error of reversible character occurred in the giving or refusing of instructions. The purpose of the first and second instructions given for the appellee was to advise the jury that only a preponderance of evidence was necessary to support the material allegations of the declaration, but they were so framed as to give color at least to the criticism of counsel that the jury were left at liberty to determine which of the allegations of the declaration were material and necessary to be supported by a preponderance of evidence, and which immaterial to the right of recovery. The criticism of these instructions may be sound in the abstract, but no reason is pointed out, and we are unable to conceive any exists, for concluding the jury might have regarded as immaterial some material allegation, and because of such error did not understand such allegations must be supported by a preponderance of testimony. Nothing in the case warrants the conclusion the

cause of the appellant company was or might have been prejudiced by anything contained in or omitted from these instructions.

It is insisted that in the third instruction, it is assumed as being true the appellant company was negligent as charged. The instruction is somewhat peculiar, but the objection to it is based upon deductions which only arise inferentially and from strained and refined constructions of its context.

A more reasonable and fair reading removes the objection, and when considered in connection with the other instructions given in behalf of each of the litigants, it can hardly be seriously urged the jury could have been misled to believe the court had assumed to decide that question of fact for them. There is no substantial ground of objection to the fourth instruction. It concludes with the words—"And you should find for the plaintiff," but when considered in connection with that which precedes, it is clear the jury would not regard this as an arbitrary direction to return a verdict for the plaintiff, but as contingent upon the conclusion reached by them upon the matters referred to in the body of the instruction.

The appellant company had introduced proof that the barrel was blown into the shaft by a sudden and violent gust of wind, and upon this based the contention the death of the deceased was the result of unavoidable accident. The fourth instruction upon that point is as follows: "No one is liable for a pure accident; still the law of this case is, that if the evidence shows that the deceased was killed by the combined elements of an accident and the negligence of defendant, as charged in the declaration, while he was in the exercise of due care and caution for his safety, under the circumstances surrounding him at the time, and if the evidence shows that such negligence was the proximate cause of deceased's injury and death, as alleged in the declaration, then the law is for the plaintiff, and you should find for the plaintiff."

The principle declared is in no material respect different from that announced in *Pullman Car Co. v. Lack*, 143 Ill.

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245, where it was said: "If the injury is the result of the negligence of the defendant and of a third person, or if an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant, the plaintiff may recover if the negligence of defendant was an efficient cause of the injury."

We think the instruction was applicable to the facts of the case.

The end to be subserved by protecting the opening of the air shaft by planks, curbing, fencing, wire screens or any other means was to prevent anything from entering the shaft whether such object should come there by unavoidable accident or the intentional or inadvertent act of any person.

If the exercise of ordinary care required that appellant company should have provided and maintained such covering or protection, and it failed to discharge its duty in this regard, the failure could but be regarded as the efficient cause of any injury which resulted from the admission into the mouth of the pit of any thing or substance which would have been excluded, had reasonable care to that end been exercised, and that, too, without regard to the cause or force which brought the thing or substance to the opening of the shaft.

It is not complained the court modified or refused any instructions asked by the appellant company.

Twelve were granted at its request, and the law appertaining to the defense sought to be made, fully and fairly given to the jury.

The judgment is right upon the merits and the record free from error of reversible character.

Linus Graves v. City of Bloomington.

1. **CEMETERIES—*Use and Management of.***—Although the charter of a cemetery association may confer a private franchise, yet the use made of it, necessarily impresses it with a public character in some degree, and when lots are sold for burial purposes, the purchasers acquire the right

to visit the same and to improve and care for such lots either in person or by agent, but those seeking admission must, of course, come during proper hours and for proper purposes, and when admitted must observe the decorum of such a place, and the superintendent may exclude any whose presence or conduct is unseemly or indecent.

Complaint, for assault and battery. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed November 21, 1896.

OWEN T. REEVES and HARVEY HART, attorneys for appellant.

JACOB P. LINDLEY, city attorney, for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant was charged with an assault and battery contrary to the city ordinance. The case was tried before a police magistrate and was afterward removed by appeal to the Circuit Court, where by consent of the parties a jury was waived and the issues submitted to the court. Appellant was found guilty and a fine of \$10 was imposed from which he prosecutes this appeal. The proof shows that appellant did inflict personal violence upon the prosecuting witness, Helena Franks, and the defense is that he was justified in so doing in order to keep her from entering the grounds of the Bloomington Cemetery Association. He was the superintendent of the cemetery and claimed the right to exclude her therefrom.

She insisted that by usage and as a matter of right she and the public generally could visit the cemetery at proper times and under reasonable conditions, and that she had a special right because she was employed by persons owning lots therein to care for the same and keep the graves and flowers thereon in proper order. At the time the difficulty occurred she was about to go in with a bucket of water and a sprinkling pot for that purpose. She also claimed the right because her husband was buried there.

An ordinance of the city forbade persons from visiting any cemetery or remaining therein after sunset or before sunrise.

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It was shown that the grounds are laid off in walks and drives and that the public go there without hindrance during the usual hours of the day, more especially on Sundays and when the weather is fine. The charter of the association was produced, from which it is claimed that the association is purely a private corporation, and that it may exclude any and all persons at pleasure. Granting that the charter confers a private franchise, yet we think the use made of it must, necessarily, impress it with a public character in some degree. When lots are sold for burial purposes the purchasers certainly acquire the right to visit the same and to improve and care for them. This may be done in person or by agent. A great number of persons thus acquire an actual right to go there during proper hours and for proper purposes. In order that this right may be the better enjoyed, convenient walks and driveways are provided and the public are admitted without distinction. This is customary and accords with the general sense of propriety. Of course, those so admitted, must observe the decorum of such a place. The superintendent may exclude or reject any whose presence or conduct is unseemly or indecent. Was there in this case any good reason for excluding the prosecuting witness? We think not—at least there is no sufficient ground for overruling the conclusion of the trial court on that point. She had an arrangement with persons owning some six or eight lots by which she was to take care of the same, as already stated, and she was going there for that purpose. The appellant insisted that she had given him trouble by meddling with other lots and graves, and that she had remained after hours on one occasion. She denied this and it does not appear that she had so violated reasonable regulations as to furnish an excuse for exclusion altogether.

Furthermore it seems quite clear that if she was properly subject to exclusion, the conduct of appellant was unnecessarily and unreasonably forcible and violent.

In no view of the case, as shown by the record, is he to be justified.

The judgment will be affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1896.

Oscar S. Steward v. West Chicago Street Railroad Company.

1. EVIDENCE—*When Testimony of Witness May be Disregarded.*—An instruction which tells the jury that if they believe any witness has willfully testified falsely as to any material fact, they may disregard his evidence entirely except in so far as it is corroborated by other credible witnesses, or by all the facts and circumstances in evidence, is bad, because it requires corroboration by more than one witness or by all the circumstances.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 28, 1896.

WING, CHADBOURNE & LEACH, attorneys for appellant;
BROWN & SNYDER, of counsel.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

After a trial ending March 26, 1896, in a verdict for the appellee, and a motion for a new trial, denied April 8, 1896, the appellant filed September 19, 1896, under stipulation *nunc pro tunc*, as of June 2, 1896, a bill of exceptions, "O K'd" by an attorney of the appellee, containing a very extraor-

dinary instruction as given on behalf of the appellee. No blame is imputed to anybody. The mistake was made in reading from the notes of a stenographer the contents of a lost instruction.

November 16, 1896, the appellee procured in the court below a substitution of other instructions, by amendment of the bill of exceptions. We do not find it necessary to give further details as to this amendment and substitution.

The record, as now presented amended, contains as an instruction given on request of the appellee, the following:

“If the jury believe from the evidence that any witness has willfully and deliberately testified falsely to any material fact in this case, then the jury may entirely disregard all the testimony of such witness, except in so far as it may be corroborated by other credible witnesses, or by all the circumstances and facts as shown by the evidence in this case.”

The action was for a personal injury, the appellant alleging that he received it by the negligence of the appellee.

He so testified, and was corroborated by one witness—one only.

They were contradicted by witnesses for the appellee.

Before the jury the question was upon the veracity of the witnesses.

If the jury believed from the evidence that the appellant and his witness had each “willfully and deliberately testified falsely to any material fact in the case,” though the facts were different and disconnected, and of minor importance, then the whole testimony of each might be by the jury entirely disregarded, although the jury might believe that in the main the testimony was true. The appellant and his witness corroborated each other, but neither of them was corroborated by witnesses, in the plural.

And in no case of any variety of circumstances can any witness be corroborated “by all the circumstances and facts as shown by the evidence.” For various faults in instructions as to credibility, many judgments have been reversed. *Hoge v. People*, 117 Ill. 35.

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But in no case, which we can recall, was the credibility of the witness hinged upon an impossible corroboration.

Without going more into detail, the judgment is reversed and the cause remanded.

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**Brink's Chicago City Express Co. v. Frank T. Kinnare,
Adm'r.**

1. NEGLIGENCE—*Questions of—Submitted as Questions of Fact.*—When the question as to whether A has been guilty of negligence has been fairly submitted to a jury the verdict is conclusive.

2. SPECIAL FINDINGS—*As to Controlling Facts.*—It is only as to controlling facts that a party has a right to have special findings.

3. EVIDENCE—*City Ordinances in Personal Injury Cases.*—In an action for personal injuries where there is evidence tending to show that the defendant's team was being driven at a rate of speed forbidden by the city ordinances, and that such violation contributed to the injury, the city ordinances are properly admitted in evidence.

Trespass on the Case.—Death from negligent acts. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This is an action on the case, brought by appellee as administrator, to recover damages for the death of the intestate, such death being alleged to have been caused by the negligence of one of the servants of appellant.

The deceased was, at the time of his death, a boy about four years of age. Appellant was a corporation of this State, engaged in the business of transporting goods and merchandise in and about the city of Chicago, using horses and wagons as the means of making such transportation. The deceased lived with his parents on West Madison street, near the corner of Canal street, but a few rods from the scene of the accident. On the 15th day of July, 1893, about the hour of noon, one of the wagons of appellant was going

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west on Madison street; it was an ordinary, covered, one-horse express wagon, with a light load therein. From the west end of the railroad viaduct on Madison street there is a slight decline to the west, extending as far as Canal street, a distance of from 150 to 200 feet. The deceased was endeavoring to cross Madison street, and was struck by the horse or wagon of appellant, receiving injuries from which death resulted almost immediately. The parents of the deceased had lived near the corner of Canal and Madison streets for years, being then engaged in the clothing business, with living rooms in the rear of their store. A street car line was in operation on Madison street, and the passage of teams and vehicles along Canal as well as Madison street was of very frequent occurrence. Just prior to the accident, the father of the deceased had given him money with which to go out and purchase fruit for himself. The horse attached to appellant's wagon was about ten years old, well broken, gentle, used to being driven about the city, and sore in the feet. The driver of the wagon (who died prior to the trial of this cause) was a competent and reliable man, who had been in the employ of the company for a considerable space of time.

There was a sharp conflict in the evidence on the following questions :

Whether there were one or two persons upon the driver's seat at the time of the accident; whether at such time the driver and some person on the seat with him were "fooling" with one another; the direction in which the deceased was going when struck; whether he was on the cross-walk or not at that time; whether the horse or the wagon struck him; the rate of speed at which the wagon was going; what the deceased was doing when struck, and what was said and done by the father at the time he gave deceased the money to buy the fruit; also as to whether there was a fruit wagon immediately in front of the store of the father when he gave deceased the money to buy the fruit.

The jury found the defendant guilty, and assessed the plaintiff's damages at \$3,000; the jury returned the following answers as a part of their verdict :

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“What rate of speed does the evidence show the horse was going at the time of the accident?

Seven miles an hour.

Was the driver guilty or not guilty of negligence in driving the horse at the time of the accident?

He was guilty.”

NEWELL & HELDMAN and JAMES H. VAN HORN, attorneys for appellant.

MOSES, PAM & KENNEDY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

That the deceased while going across Madison street was struck and killed by a team driven by appellant's servant, is undisputed. Whether death was the result of negligence by this servant, and whether the parents of this child were, in their care over him, so negligent as to preclude a recovery—that is, did not exercise ordinary care in respect to their son, were matters concerning which there was, as appellant urges, a sharp conflict in the testimony.

There was no clear preponderance for appellant as to these matters; and we must therefore treat these questions as having been properly decided by the jury adversely to appellant. The instruction to the jury that if the negligence of the parents of the deceased contributed to the injury the plaintiff could not recover, was all that, in this regard, the defendant was entitled to.

The instruction to the effect that nothing contained in any instruction is to be taken as an intimation as to any fact, has been often approved by the Supreme Court. The jury were in all respects fairly instructed, and appellant has no just ground of complaint in respect thereto.

The court properly refused to allow a witness to be asked his opinion as to whether the driver could have stopped in time to avoid the accident had he observed the deceased. The witness was not an expert as to such matters. The re-

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quests for special findings made by appellant were properly refused; neither was as to a controlling matter. It is only as to controlling facts that a party has a right to have special findings. *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 145; *Hannewacker v. Furman*, 47 Ill. App. 17; *C. & N. W. Ry. Co. v. Bouck*, 33 Ill. App. 127.

The city ordinances were properly admitted, as there was evidence tending to show that appellant's team was being driven at a rate of speed forbidden by the city regulations, and that such violation contributed to the injury.

The parents of the deceased may have been negligent; we are inclined to think that they were; but this question of fact having been fairly submitted to the court and jury below, we find no sufficient reason for overturning the conclusion there reached.

The judgment of the Circuit Court is affirmed.

Abendpost Company v. Frederick Hertel.

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1. **PLEADING**—*When the Common Counts are Sufficient.*—Where a person in the employ of a publishing company at a weekly salary and a commission upon advertisements procured by him, is discharged by his employer he will be entitled to recover, under the common counts, the amount due him upon his weekly salary as well as the commission upon all advertisements procured by him and used by the company, although his full term of service has not been completed.

2. **CONTRACTS**—*Customs and Usages—Duty of the Courts in Construing.*—Whenever it is necessary for a court to construe a contract it will place itself in the shoes of the parties, thus reading the subject-matter from their standpoint, that it may see it in the view it had to them when entered into; consequently the customs and usages of the contemplated business and service known to the contracting parties when the agreement was made, is admissible in evidence, but neither such custom nor usage can do away with the plain stipulations of the contract.

3. **MASTER AND SERVANT**—*Discharge—Knowledge of Cause for—Reasons Given for.*—In a suit for a wrongful discharge, if it be proved that facts existed rendering a discharge proper, it is immaterial whether the knowledge of such facts came to the employer before or after the dismissal, or whether the reasons given for the dismissal were sufficient or not.

Assumpsit, upon a special contract. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded, unless the parties can agree on the amount due for which the judgment will be affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

Appellee brought an action for damages for breach of a contract of employment. Appellant conducted a newspaper in the city of Chicago, called "Abendpost," published in the German language. An agreement in writing was entered into between appellant and appellee, in the following terms:

"Memorandum of verbal contract between the Abendpost Company and Mr. Hertel.

CHICAGO, ILL., February 25, 1892.

Mr. Hertel to be advertising manager of the Abendpost Company.

He is to take his instructions from Mr. Glogauer, exclusively, and to be independent of any other officer or employe of the company.

He is to receive a salary of twenty dollars (\$20) per week, and besides a commission of ten (10) per centum on all advertisements solicited by him. The entire trade now credited to Victor von Serenyi to be considered as solicited by Mr. Hertel.

This contract to be in force for one year from the date hereof, unless sooner terminated by mutual consent.

THE ABENDPOST Co.,

By FRITZ GLOGAUER, Pres't.

FRED'K HERTEL."

It is claimed that this agreement was superseded by a letter of December 29, 1892, and extended to January 1, 1895.

On February 4, 1893, appellee was discharged by appellant, and thereafter brought his suit, the defense to which was conducted upon the theory that appellee's action fully justified a discharge, and therefore appellant was not re-

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sponsible in damages. The trial resulted in a verdict of \$2,403.47 in favor of appellee, upon which the court below entered judgment after overruling a motion for a new trial and in arrest of judgment.

The most important point in the case is, whether, under the circumstances shown by the record, the discharge of appellee was justifiable.

GOLDZIER & RODGERS, attorneys for appellant.

MUNSON T. CASE and CASE & HOGAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Under the contract between appellee and appellant, appellee testifies that it was his business to give orders to Shaad, his assistant, and that he did so; that his relations with Shaad were such that he was manager and Shaad his assistant. He says: "I was to give him instructions, and he obeyed them when he felt like it, and did not when he didn't. On one occasion I did have a fisticuff row with my assistant. I gave him a slap in the face and he returned it, in front of the Abendpost. Afterward we had trouble, and I reported to Glogauer. He called Shaad up, and in my absence told him he was to obey my orders. I also saw a copy of a letter to that effect. Later, my assistant interfered with me by going to see some customers whom he should not see, and I again reported to Glogauer."

It is manifest that prior to the discharge of appellee, there was a good deal of friction between him and his employer. Appellee, among other things, testifies: "I also had charge of advertising contracts with the railroad companies. I was the man who made them, and kept them in my possession, and it was intended that requests for transportation should go through my hands. I also carried on the correspondence concerning the closing of these contracts, whatever there was. Mr. Glogauer had requested me to get the railroad business into shape.

Q. And you did? A. I did to the best of my ability, until such time as I was interfered with by my assistant, and he went around and he would lower prices thirty per cent below me, and I told in the office—I forget who it was—I told somebody under those circumstances it was just idle work for me to try and bring that railroad department into shape.

Q. And that you would not have anything further to do with it? A. Well, I might have said that I was disgusted with it.

Q. Well, didn't you say you would not have anything further to do with it? A. I don't remember that I did but I might have said so. I did not throw up these contracts or surrender them to the bookkeeper. I do not remember saying that I would have nothing further to do with them."

It appears that on Saturday, the 28th of January, 1893, appellee had trouble with his assistant about a desk. Appellee went to the office of the president of appellant and made a complaint concerning the matter. During the next week appellee, according to his own testimony, appeared at the office only on Monday and Tuesday. None of the other employes or officers of the paper seem to have seen him at the office on any occasion during that week. On Monday Mr. Glogauer, the president of appellant, finding that appellee had not been at the office during that day, left a letter on his desk, requesting to see him at the editorial rooms. On Tuesday, finding appellee absent, and his own, Mr. Glogauer's, letter unopened upon appellee's desk, together with other correspondence, Mr. Glogauer wrote to him the following letter:

"CHICAGO, January 31, 1893.

Mr. Frederic Hertel, City.

DEAR SIR: According to the terms of your contract with the Abendpost Company, I hereby instruct you to resume at once all the functions which you have exercised up to this time, and which, as you deemed fit to inform me indirectly, you have relinquished without order. If you can

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not or will not comply with this request, you will oblige me by handing in your resignation.

Yours respectfully,

Fritz Glogauer,
President of the Abendpost Co."

Appellee excuses his absence from the office during that week by the statement that he was ill. As to the letter of January 31st, by Mr. Glogauer to him, he says:

"After receiving that letter I sat down to answer it.

Q. Well, go on; state the particulars. A. Well, I did answer it, but the letter got to be rather longer than I expected it would be. It was written in long-hand, and I suppose it must have been six or seven or eight pages, but it got to be pretty late that night—I suppose it was ten o'clock before I got through with the letter, so I thought I would not mail it that night, and kept it over until the next morning. Next morning read the letter. Started down town to go to the Abendpost. On the way my throat commenced to trouble me, and I concluded not to go down, and I had the letter which I had written to the Abendpost copied by a typewriter on Thursday, the 2d of February; it was copied at the office of Dr. Brinkerhoff, in McVicker's Theatre building. I mailed it in the box southeast corner of Dearborn and Madison streets; it was addressed to Fritz Glogauer, president of the Abendpost Company."

The following is the letter:

"CHICAGO, ILL., Feb. 1, 1893.

Mr. Fritz Glogauer, Prest.

DEAR SIR: Yours of the 21st ultimo, at hand. I have not relinquished my functions, that is, to procure Ads. to the best of my ability. Yesterday 1,700 lines, display, to-day 600; in other words, \$175 prove this. Besides I had yesterday arranged with Kimball and Dr. Brinkerhoff for a three inch contract from March 1st. A conference to-day with Frank Bros., Streeter, Loring and Chas. A. Stevens will very likely result in some yearly contracts at full price in the course of this month, provided I am not interfered with. Therefore your haughty language is, to say the least, in bad taste and

entirely unwarranted by the circumstances. I ask myself what have I done to be addressed in such a manner, and I fail to discover any plausible reason. I have filled my position, so far as circumstances permitted, with better results than any of my predecessors; have worked honestly, faithfully and conscientiously, and if you had not thought so you would not have prolonged my contract to January 1, 1895. The outcome is, that in spite of a smaller circulation, the Abendpost, as an advertising medium, stands to-day in quality and quantity fifty per cent higher than ever before, and exclusively through my work. Any newspaper man in Chicago will tell you so if you do not know it. Again, what cause for complaint have I given you? How have you appreciated my work and endeavors? Certainly not by honest and straightforward dealing. While you have solemnly pledged yourself, in the presence of your secretary, not to underbid me, you have personally granted rebates and reductions against which I could not compete, and your stipulation to keep the matter secret is proof that you knew you were acting in bad faith. It is only by chance that I became acquainted with this state of affairs later on, and further investigation revealed that rebates, etc., have all along been the rule, while honest rates were the exception. You have often stated before the entire office, with great bravado, that rates must be kept up under all circumstances, enjoining me, for instance, from accepting 'fat locals' at \$1, when at the very same moment you jumped at them in a quiet way, unbeknown to me, at 40 cents and less. By such questionable methods I was prevented from closing contracts with about half a dozen State street houses, and consequently minus the commissions which a fair and honest compliance with the spirit of our contract would have given me. Of course I remonstrated against such proceedings whenever they came to my knowledge. But let that pass for the time being. The principal cause of friction and discontent was the eternal interference with my privileges on the part of my so-called assistant. Numerous complaints have caused you to investigate, to acknowledge the justice of my grievance, and the necessity of removing the cause.

In the absence of my assistant you have, on a dozen occasions, been very emphatic, yes, even rampant (to the great amusement of the office *personnel*) in your declarations and vows that he must and should be discharged the very first time he refused to comply with my instructions. But in the last moment you always lacked the courage to live up to your promises and to abolish a method which you yourself pronounced as detrimental to the success of the advertising department. This very same question was made the main feature of our new contract. Although my credulity caused a good deal of amusement in certain circles, I trusted to you when you pledged your word of honor, as a man, and sealed the compact by solemn hand-shaking, that you would muster courage enough to become independent of the "power behind the throne," as the boys call it. Perhaps the benzine incident will refresh your memory. I will not rehash ancient history, but only state that since the 29th of December, 1892, the date of our new contract (during my absence in the east):

1. My assistant called upon State street houses, contrary to my explicit orders, as you knew at the time " (under the plea that if he did not come in as a sort of guardian angel we would lose the trade)."

2. He neglected or refused to call on people to whom I had sent him (Eberhard, etc.,) so that I had to accept their Ads. from the International Agency.

3. I requested him to renew Dr. Gagnon, who was paying \$60 for four inches per month, with instructions not to take any less or to leave him alone. Instead, he donates \$10 on my old contract, and makes a new one at \$75, less the above \$10, leaving \$65 for one inch, e. o. d. for one year.

4. Contrary to orders, he went to railroad offices, making rates thirty per cent below mine. On hearing this you were again very emphatic (in his absence, as usual). The conference with him on Friday afternoon had such a crushing effect, that the following Monday—

5. He went, contrary to orders, to the Northern Trust Bank, etc. Let these few instances suffice. There is too

much method in these proceedings to convince me that they are not intentional, and I am strengthened in my belief by a personal, unprovoked insult, offered on last Saturday in the presence of the entire office. Under the sting of this insult I spoke to you and stated that I would have nothing more to do with him. I repeat that now most emphatically, and demand that you comply with the terms of our new contract without any further evasions, quibbles, subterfuges or delays. I will not submit to any further humiliations and interference, particularly not to insults in my own office, and if that does not suit you, and if you refuse to grant the privileges of my position, like any other daily paper (that is, all facilities and assistance at your disposal), my resignation will be tendered as soon as we can agree on an equitable basis of settlement on all outstanding contracts, most of which have been extended to January 1, 1894. I am willing to settle at a low figure, if thereby we can arrive at a quick and peaceable arrangement. If, however, that can not be accomplished, it will be about time for me to investigate whether the trouble lies in your want of good will, or, as you stated recently, in your want of power. There is certainly some way to get these things into a correct shape. Meanwhile I attend to my duties as before. Unless specially wanted, I will not be at the office for a few days, as, in the first place, I can not produce any Ads. there, and, secondly, because I want to nurse my sore throat, which troubles me a good deal.

Very respectfully,

FRED'K HERTEL,

Adv. Mgr."

Appellee testified: "On that day went to Carson, Pirie & Co., because I had been promised an advertisement there. After sending letter I went home.

Q. Why did you go home?

(Objected to as immaterial; overruled; exception by the plaintiff.)

A. Because my throat hurt me; it troubled me."

Appellant wrote to appellee as follows:

Abendpost Co. v. Hertel.

“CHICAGO, February 2, 1893.

Mr. Fred. Hertel, 116 Montana St., City.

DEAR SIR: You have neither replied to the letter I sent you yesterday, nor have you made your appearance in the office of the Abendpost since Saturday last. I therefore consider your place as advertising manager vacated, and shall appoint your successor to-morrow.

Yours respectfully,

Fritz GLOGAUER.”

And received from appellee the following reply:

CHICAGO, February 2, 1893.

Mr. Fritz Glogauer, Presdt., 203 Fifth Avenue.

DEAR SIR: Your epistle of the 31st of January was received at my house yesterday, February 1st, about 7 p. m., and was answered fully this morning. If it has not come into your hands, it may, perhaps, have found its way into the waste basket. Your assertion that I had not been in the office since Saturday last, proves your absolute ignorance of what is going on. I was there day before yesterday and went home on account of my throat. You might have learned all this by a simple inquiry, but your not asking discloses your aim. If I feel better, I will try and be at your office Saturday noon; meanwhile you can make as many appointments as you please. My contract holds good until January 1, 1895. If you insist upon war you can be accommodated.

Yours truly,

FRED'K HERTEL,

Adv. Manager.”

To which letter appellant replied as follows:

“CHICAGO, Feb. 3, 1890.

Mr. Fred. Hertel, City.

DEAR SIR: The mere fact that all communications addressed to you, including my own letter of Jan. 31st, lay dead in your office, proves conclusively that you have not favored the Abendpost with your visit. Whether you have seen our customers on State street is, at least, doubtful and entirely immaterial. You saw fit to ignore me, and to

state to Mr. Lorenz that henceforth you would do nothing but see a few houses on State street. One of your letters to Mr. Lorenz contained insulting references to me. When I instructed you to resume all your functions at once, you did neither reply in writing nor appear at the office. I waited thirty-six hours before I notified you of your discharge. All our customers have been notified that you have ceased to be advertising manager of the Abendpost, and my decision is final. If you thought that your contract entitled you to do what you please—and I have no other explanation of your conduct—you will find out your mistake.

Yours, respectfully,

Fritz Glogauer."

An employer is entitled to respectful treatment by his employes. Appellee is a man of superior ability and education. It was neither through inadvertence nor ignorance that he wrote the insulting letter of February 1st, and it would seem he must have known that unless the president of the Abendpost company were very different from the ordinary business man in charge of a large commercial enterprise, it would be impossible, after the writing of such a letter, for harmonious relations to exist between him and Mr. Glogauer, or the intercourse between them to be such as the proper discharge by appellee of his duties as an employe of the paper, required.

There does not seem to have been any sufficient excuse for the act of appellee in striking in the face his assistant, Mr. Shaad.

It is manifest that no employer is obliged to or can tolerate such conduct.

Appellee was properly discharged. He is entitled to receive all compensation by him earned up to the time of his discharge, unless deduction should be made for his absence during the week immediately prior to the severance of his relations with appellant. This, we do not understand appellant insists upon. The compensation of appellee consisted of a certain stipend per week, and also a commission upon all advertisements solicited by him. Upon all advertise-

ments obtained by appellee which were afterward published in the Abendpost, whether before or after his discharge, he is entitled to the agreed commission.

Whether appellee did obtain contracts, and if so, from whom, and the extent—that is to say, the terms—thereof, is a question of fact to be submitted to the jury. Upon all contracts for advertisements obtained by him, which were published in the Abendpost, either before or after his discharge, he is entitled to a commission. We think appellee is entitled to recover such commission under the common counts; the work he was to do in respect to such contracts, having been, as we understand the evidence, fully performed, so that when the advertisements were published, his claim for commission thereunder was like his claim for his weekly salary, a thing fully earned, and therefore recoverable under the common counts, although his full term of service, and therefore the entire contract he had entered into, had not been fulfilled; in other words, the contract of appellee with appellant is, in respect to the compensation of appellee, severable. 16th Am. Ed. of Chitty on Pleading, Vol. 1, p. 350, 353, 359.

Whenever it is necessary for a court to construe a contract, it will place itself in the shoes of the parties, that, reading the subject-matter from their standpoint, it may see it in the view it had to them when entered into; consequently, the customs and usage as to the contemplated business and service known to the contracting parties when the agreement was made, is admissible in evidence, but neither such custom nor usage can override or do away with the plain stipulations of a contract. 8th Ed. of Addison on Confs., 182; *Samuels v. Oliver*, 130 Ill. 73; *Everingham v. Lord*, 19 Ill. App. 565.

The accounts rendered by the respective parties and claims for compensation made, were admissible in evidence, as bearing upon the question, among others, as to whether the claim for commissions upon certain contracts alleged to have been obtained by appellee, is a just one.

It is urged by appellee that the letter of appellee dated

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February 1st, had not been received by, and therefore was not known to, appellant at the time the letter of discharge was sent. This is immaterial. Whether the reasons given for a discharge are sufficient or not, or whether reasons justifying a discharge were known to the employer at the time of dismissal, is immaterial. If there existed facts rendering a discharge proper, it is immaterial whether the knowledge of such facts came to the employer before or after the dismissal. *Ridgeway v. Hungerford Market Co.*, 3 Adolphus & Ellis, 171; *Sterling Emery Wheel Co. v. McGree*, 40 Ill. App. 340; *Wood on Master and Servant*, Sec. 121; *Allentown Iron Co. v. McLaughlin*, 24 W. N. C. Pa. 343.

As we have before said, as to what contracts for advertising, if any, appellee obtained, as well as the terms thereof, is a question of fact for the jury, while the construction of such contracts, their terms being certain, is for the court.

If the parties can agree as to what amount is, under the opinion of this court, due to appellee, the judgment of the Superior Court will be affirmed for such sum. If the parties are not able to so agree, the judgment of the Superior Court will be reversed and the cause remanded.

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Southern Pacific Company v. American Well Works.

1. PLEADING—*Special Contracts—Under the Common Counts.*—Where a special contract has been terminated by the fault of the defendant, if the plaintiff is entitled to recover at all for what he did under it (not including damages for being prevented from doing more or for being hindered in what he did) he may do so under an appropriate common count.

Assumpsit, under a special contract. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

SMILEY & CLARK, attorneys for appellant; BAKER, BOTTS, BAKER & LOVETT, of counsel.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a controversy about excavating and supplying apparatus for wells. There is not an exception to any action of the court in admitting or rejecting evidence during the trial, alluded to in the appellant's brief.

The just inference is, that the trial was fair and that court and counsel behaved like gentlemen.

The court, to the extent of two and one-half pages of the printed abstract, at the request of the appellant, charged the jury in many respects more favorably to the appellant than at first blush seems justifiable, and covering every point of defense against the claim of appellee that could be urged. There is nothing before us in effect, except the question whether the jury found the right verdict upon the evidence, and upon that question the rule applies that verdicts upon conflicting evidence stand.

There were in all four wells. As to three of them, the defense against the claim of the appellee was that they had been paid for, partly in cash and partly by deductions which were acceded to by the appellee in settlement of disputes; all of which was in dispute upon the trial. As to the other well, the defense was that there was a special contract, which the appellee did not perform. That was not denied by the appellee, but it insisted that the fault was with the appellant, all of which was also in dispute upon the trial.

Now, the appellant urges that the special counts upon the contract are not proved, and that for what was done by the appellee, no recovery can be had upon the common counts.

As we understand the law, if the appellee is entitled to recover at all for what it did (not damages for being prevented from doing more, or for being hindered in what it did), it may do so under an appropriate common count. *Butts v. Huntley*, 1 Scam. 410; *Shaffner v. Killian*, 7 Ill. App. 620; *Parmly v. Farrar*, p. 624, this volume.

The judgment must be affirmed.

Lake S. & M. S. Ry. Co. v. Adolph Hochstim and Morris Bossak, partners as Hochstim & Bossak.

1. COMMON CARRIERS—*Liable for Loss of Merchandise Received as Baggage.*—A common carrier who receives articles as baggage with notice of their character, is liable for their loss, although they be in fact merchandise.

2. SAME—*Principal May Sue for Loss of Goods Shipped as Property of Agent.*—A traveling salesman shipped sample cases containing merchandise as his own, when they in fact belonged to his employers. *Held*, that the ownership of the property was immaterial, and that the undiscovered principals had a right to declare themselves and sue for a loss of the goods.

Trespass on the Case, for loss of baggage. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This was an action on the case to recover for the loss of certain sample goods, delivered to the defendant at Cleveland, Ohio, for transportation to Chicago.

The allegations of the declaration are, in effect, that the plaintiffs, on April 18, 1891, caused to be delivered to the defendant, at Cleveland, Ohio, two telescope sample cases, containing thirty-five fur capes and thirty-three fur collars, and a lot of fur strips, the property of plaintiffs, to be transported from Cleveland, Ohio, to Chicago; that the defendant agreed with plaintiffs to safely and securely deliver same to plaintiffs. The breach alleged is, that defendant did not safely and securely deliver the same to plaintiffs, but by the misconduct and negligence of defendants and its servants, the two telescope cases were broken and destroyed, and a portion of the contents of the same were lost to plaintiffs.

The evidence for plaintiffs was that of one Samuel Moskowitz. He testified that he was a traveling salesman in the employ of plaintiffs, and sold fur capes and collars for plaintiffs, who were fur manufacturers, and, being such sales-

man, he had in his possession at Cleveland, Ohio, on April 18, 1891, the telescope cases in question, which were, with the contents, the property of plaintiffs.

The witness went to the baggagemaster of defendant, at Cleveland, Ohio, told him that he had his sample cases there, wished them checked for Chicago, and he asked the said baggagemaster if he would promise to send them to Chicago by the first train, and to have them there by Monday morning, as on that day he had an engagement with a house there, to show his samples. The baggageman promised to send them by the next train.

Moskowitz delivered the cases to the baggagemaster and got two checks for them, but did not come on the train with his baggage, taking a later train.

The telescope cases in question were checked on the strength of a ticket possessed by Moskowitz, the traveling salesman of plaintiffs, and on the faith of representations made by him at the time the same were checked, that the sample cases were his own.

Moskowitz says that he received twenty-five capes and thirty-three collars, and that there were eighteen capes and four collars lost; and this suit is to recover for the articles lost.

A jury was waived by the parties, and the cause was heard by the court without a jury. The court found the defendant guilty, and assessed plaintiffs' damages at \$326.61. Defendant's motion for a new trial was overruled, and judgment on this finding was rendered against the defendant, April 8, 1896, for the said sum of \$326.61.

The value of the articles missing and sued for was \$270.91. Interest on this sum was allowed.

WM. McFADON, attorney for appellant.

Samples of merchandise for sale are not baggage, within the meaning of that term. *Spooner v. H. & St. J. Ry. Co.*, 23 Mo. App. 409 and 410; *Thompson on Carriers of Passengers*, 510; *Ray on Negligence of Imposed Duties (Passenger)*, 565.

The rule is that where negligence arises out of a contract,

only a party to the contract can bring a suit as a result of such negligence. *Becher v. Great Eastern Ry. Co.*, L. Rep. 5 Q. B. 241; *Alton v. Midland Ry. Co.*, 115 E. C. L. Rep. 236; *Stutler v. Passenger Ry. Co.*, 54 Penn. St. 375.

Where a fraud is perpetrated upon a railroad company and such company is obliged to carry under the guise of baggage the property of another, there can be no recovery. *Dunlap v. International Steam Boat Co.*, 98 Mass. 371; *Talcott v. Wabash Ry. Co.*, 66 Hun, 456; *Stimpson v. Conn. River Ry. Co.*, 98 Mass. 84; *Gurney v. Grand Trunk*, 14 N. Y. Supplement, 321; S. C., 138 N. Y. 638.

ADOLPH ASCHER, attorney for appellees; DANIEL V. GALLERY, of counsel.

Although samples carried by a passenger are not personal baggage, yet if the baggagemaster, knowing the character of the articles carried, accepts them as baggage, the carrier is estopped to deny that they were baggage in an action for their loss. *Capps v. R. R. Co.*, 16 Am. & Eng. R. R. Cases, 118.

While the obligation of a carrier of passengers is limited to ordinary baggage, yet if he knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, he will be liable for their loss or destruction, though without fault. *Oakes v. Northern Pacific*, 26 Pacific, 230; *Railroad Co. v. Rosenthal*, 29 S. W. 196; *Railroad Co. v. Shepherd*, 8 Exch. 30; *Minturn v. R. R. Co.*, 41 Mo. 503; *Ross v. R. R. Co.*, 4 Mo. App. 583; *Perley v. R. R. Co.*, 65 N. Y. 374; *Hannibal R. R. Co. v. Swift*, 12 Wall. 262; *R. R. Co. v. Conklin*, 32 Kan. 55; *Jacobs v. Tutt et al.*, 33 Fed. 412; *Baldauf v. R. R. Co.*, 16 Pa. St. 67; *Mauritz v. R. R. Co.*, 23 Fed. 765; *R. R. Co. v. Fraloff*, 100 U. S. 24; *Story, Bailments*, paragraph 499; *Central Trust Co. v. Ry.*, 39 Fed. 417; *Stoneman v. R. R. Co.*, 52 N. Y. 429.

The owner of property lost by a carrier, can maintain an action for its value on the contract made for his benefit by his agent. *Sims v. Bond*, 5 B. & Ad. 389; *Higgins v. Senior*, 8 M. & W. 833; *Beebee v. Robert*, 12 Wend. 413; *Tain-*

L. S. & M. S. Ry. Co. v. Hochstim.

tor v. Prendergast, 3 Hill, 72; Sanderson v. Lamberton, 6 Binn. 129.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The carrier having, after being informed as to the character of the articles, received them as baggage, is liable for their loss, although they consisted of merchandise. Hutchinson on Carriers, Sec. 685, note 1; Hannibal Ry. Co. v. Swift, 12 Wall. 262-274.

That the articles lost were actually the property of the plaintiffs, the employers of the traveler, was immaterial to the defendant.

The witness doubtless spoke as is customary with traveling men concerning their samples, calling them his samples, his baggage.

The shipment was really made by the plaintiffs, *qui facit per alium facit per se*. The undiscovered principals had a right to declare themselves and sue upon the contract. Ewell's Evans on Agency, side paging, 304, 379, 395; Conklin v. Leeds, 58 Ill. 178; Barker v. Garvey, 83 Ill. 184; Elkins v. Boston & Maine Ry., 19 N. H. 337; New Jersey Steam Navigation Co. v. Merchants Bank, 6 Howard, 344.

The case under consideration is radically variant from what it would have been had not the carrier been notified that the cases contained merchandise samples.

No fraud was perpetrated upon the carrier; on the contrary, it well knew what it undertook to carry, and upon what consideration; while that the actual ownership was undisclosed, was, as we have said, immaterial.

Appellant promised to safely carry and deliver these goods in April, 1891.

By the failure of appellant to fulfill its contract, appellee was five years deprived of merchandise of the value of \$270.91.

In its discretion, the court properly allowed interest. Chicago & N. W. Ry. Co. v. Ames, 40 Ill. 249; Bradley v. Geiselman, 22 Ill. 494.

The judgment of the Circuit Court is affirmed.

Cyrus J. Wood v. Adolph Gumm et al.

1. **PRACTICE—*Entry of Appearance.***—An entry of an appearance in a cause by a writing entitled as a cross-bill in said cause giving the numbers of the original suit in which such cross-bill is filed is a sufficient entry of an appearance in the original suit to bind the party whether he was formally made a party to the original bill or not.

2. **DESCRIPTION—*What is Sufficient.***—A description is sufficient if there is enough in it to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty.

8. **MECHANIC'S LIEN—*Right of Sub-contractor Not Dependent on Architect's Certificate.***—The right of a sub-contractor to have a lien is not dependent upon the right of the original contractor to have an architect's certificate.

Petition, for mechanic's lien. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

WILBUR & HAUZE, attorneys for appellant.

WARWICK A. SHAW, C. E. CRUIKSHANK, FRED H. ATTWOOD
and **PEASE & McEWEN**, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

One Peter J. Bernhard, as owner of certain premises, entered into a contract with one A. Grosvenor, whereby Grosvenor agreed to furnish all the material and do all the work in the erection and construction of a store and apartment building and a barn, for Bernhard, upon said premises, for the sum of \$8,100.

There is no controversy but that the job was entirely completed within the time specified by the contract, and that only \$750 was ever paid on account of it by Bernhard to Grosvenor, or to anybody else.

Numerous persons, firms and corporations, who, either as original petitioners, defendants, intervening petitioners or

cross-complainants, are seeking to assert mechanic's liens, furnished material and performed work on the job under sub-contracts with Grosvenor, and the only controversies disclosed by the record are between such sub-contractors and the appellant, who acquired title to the premises *pendente lite*, by quit-claim deed from Bernhard for the expressed consideration of \$50.

The original petition was filed by Gumm and Hall, sub-contractors, under Grosvenor, for the mason work, and Bernhard, the owner, and various other sub-contractors, under Grosvenor, were made parties defendant, but Grosvenor was not.

Hanson, one of the defendants, filed a cross-petition for a lien for doing the lathing and plastering under a sub-contract with Grosvenor, and, among others, made Grosvenor a party defendant. The John F. Alles Plumbing Company obtained leave to come into the cause, and filed its intervening petition, wherein Grosvenor was made defendant with others. Others, parties defendant to the original petition, either answered claiming liens, or were defaulted.

The appellant was not made a party defendant to either bill or cross-bill, but he became a party upon his own motion, and is making the only defense that is interposed to the liens allowed by the master and decreed by the court.

The master found in favor of the several claimants for liens, and the court decreed to them liens aggregating, with interest, about the sum of sixty-nine hundred dollars, which is less than the value of the premises, and ordered a sale of the premises to satisfy the liens in case of default in the payment thereof by a day fixed by the decree.

From such decree this appeal is prosecuted.

The assigned errors are numerous, but resolve themselves principally into technical objections, of which we will notice those that are argued.

It is said that because Grosvenor, the original contractor, was not made a party to the original petition filed by the appellees Grosvenor and Hall, the decree can not stand. The record shows that a default was taken against him in the original suit, on November 23, 1895.

On June 18, 1895, his general appearance was entered, as follows :

“State of Illinois, }
County of Cook, } ss.

In the Circuit Court of Cook County, June term, 1895.

OLE HANSON	}	Number 141,585 7,478
v.		
ALBERT GROSVENOR ET AL.		

And now comes Albert Grosvenor, one of the defendants to the cross-bill in the above entitled cause, by Wilbur & Hauze, his solicitors, and enters his appearance in the above entitled cause.

WILBUR & HAUZE,
Sol'rs for A. Grosvenor.”

While such appearance is entitled by name as of the cross-petition by Hanson, the numbers given are the numbers of the original suit in which such cross-petition was filed, and the appearance is express as being in the cause.

The decree itself finds that both the cross-petition of Hanson and the intervening petition of the Alles Plumbing Company were theretofore taken as confessed by Grosvenor. We might, in passing, say that in the matter of making orders in the cause the record shows great inefficiency or negligence, either in the clerk of the court or the attorneys in the cause, or both.

But waiving such matters, we regard the appearance we have quoted as being sufficient to bind Grosvenor, whether he were formally made a party to the original bill or not. He was certainly made defendant to the cross-petition of Hanson, and served with summons and properly defaulted as to that. He was also made a party defendant to the intervening petition of the Alles Plumbing Company, and although we can not find that he was ever served with summons issued upon that petition, his general appearance in the cause was entered by the paper already quoted, after that intervening petition was filed and summons thereunder to him was issued, and we think was enough. It is clear that Grosvenor was before the court, and his interest in the

proceedings was fully disclosed, and the cause as made by any of the pleadings was before the court for its consideration. Much less formality is required in mechanic's lien proceedings than in ordinary proceedings in chancery. *Thielman v. Carr*, 75 Ill. 385.

It might be added that it is entirely clear that Grosvenor had knowledge of all the claims that were involved in the proceedings, and has no desire to defeat them. He testified in behalf of several of the claimants, and makes no claim for any lien in favor of himself. It is plain that he would be estopped now from asserting any lien to himself as against the appellant, and there is no other person who could complain, in any event, of any irregularity because he was not properly before the court.

As to all the contentions on account of the cross-bills, or answers that are said to be in effect cross-bills, we may dispose of them all by simply saying that although cross-bills were filed they were not necessary, and did neither good nor harm. All the relief that was or could have been given under the cross-bills was available under answers, and may be treated as having been so given. *Fergus v. Chicago Sash and Door Co.*, 64 Ill. App. 364.

It is urged that because the claimants for liens described the premises as "lot 17, block 3, in Wright & Webster's Subdivision, * * * otherwise known as No. 1097 W. Chicago avenue," whereas the proper description was, as proved, "lot 17 in the resubdivision of block 3," etc., therefore the petitions are not sustained by the evidence.

"A description is sufficient, if there is enough in it to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty." *Springer v. Kroeschell*, 161 Ill. 358; *Rockwell v. O'Brien-Green Co.*, 62 Ill. App. 293.

If there were any difficulty in distinguishing between "lot 17, block 3," and "lot 17 in the resubdivision of block 3," the street number "1097 W. Chicago avenue" would indicate with sufficient certainty the location of the property.

Another objection that is insisted upon, is the lack of an architect's certificate.

The right of a sub-contractor to have a lien is not dependent upon the right of the original contractor to have one. *Doyle v. Munster*, 27 Ill. App. 130; *Brin v. Lorimer*, 62 Ill. App. 657.

The decree was equitably such as should have been rendered, and should not be disturbed because of what are, at most, mere technicalities.

It will, therefore, be affirmed.

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Charles E. Wilson v. Victoria Wilson.

1. **SEPARATE MAINTENANCE**—*Effect of Offer by Husband to Live with Wife*.—An offer by a husband to live with his wife and support her, does not bar a suit for separate maintenance, as the court is not required to believe that such an offer is sincere.

Separate Maintenance.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

THOMPSON & McCASLIN, attorneys for appellant.

WALTHER & LANAGHEN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. February 11, 1894, these parties were married.

They are both Scandinavians, but he was thirty years old, had been in this country fifteen years, and seems to have become thoroughly Americanized in language and business habits, while she was an almost child of seventeen years, with a very imperfect knowledge of the English language, and probably manners not wholly similar to those of ladies with whom he brought her into association.

They began their married life in a boarding house, and their statements, as well as the statements of their respect-

Wilson v. Wilson.

ive witnesses, are widely variant, as to the conduct of the newly wedded pair toward each other.

It is certain that in November, 1894, she left Chicago, and soon was with his mother in Norway.

Having returned, she filed, September 24, 1895, this bill for separate maintenance. May 4, 1896, the court ordered that the appellant pay the appellee \$50 per month temporary alimony, the first payment to be made five days thereafter, and \$100 solicitor's fees within thirty days. From that order this appeal was taken.

That order is attacked upon the ground that the differences between the parties were trivial, could be easily reconciled, and that he offered her a home with him two days after the order was made.

That offer was by letter, and came into the case as part of cause shown by him, why he should not be attached for contempt for failure to obey the order of May 4, 1896. The letter is:

"CHICAGO, May 6, 1896.

Mrs. Victoria Wilson.

DEAR VICTORIA: I have rooms provided for us to live in at 215 North State St., and have arranged for our board and living there, where you can come at any time and live with me and I will support you. Will you come and when? Please answer by bearer.

Sincerely,

C. E. WILSON."

Although addressed to "Dear Victoria" and signed "Sincerely," the court had still before it the question of sincerity.

The suit had been pending more than seven months with no step by him toward conciliation.

There were in the record a great many letters from him to her, similarly addressed and signed, from December 11, 1894, to July 12, 1895. In one of March 27, 1895, he says:

"I say to you frankly that I will never live with you again. No, I will go to State's prison first and serve out my time and then be free from any tie. This is my decision,

Victoria, no matter how you try or what you do; you will never live with me again, and there is no law in the world can compel me to live with you, you know that."

It is unnecessary to quote much; the letters contain a great deal of bitterness.

We can not say that the court was required to believe that the offer was sincere. The amount awarded seems rather liberal. He is on a salary of one hundred and eighty to two hundred dollars per month—there is a dispute as to the amount—out of which, in a very vague way, he says "he contributes to the support of his mother and widowed sister with five small children." But the award is only temporary.

It does not appear that pending the suit anything has been paid. He is at liberty to hasten to a final decree, if he can not revivify his early love and her response to it. They are yet young enough to forgive, and assume to forget.

The order appealed from is affirmed.

James Wallace et al. v. Alice Madden.

1. FRATERNAL BENEFIT SOCIETIES—*Selection of Beneficiary*.—It would seem to be true that a fraternal benefit society, organized under the act of June 22, 1893, which provides that such societies "shall make provision for the payment of death benefits" and that "payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member," may settle the order of precedence within the classes enumerated by the act, but it can not exclude those whom the statute includes.

Bill, of interpleader. Appeal from Superior Court of Cook County: the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

When the organic law of a mutual beneficiary society provides a class to which benefits may be made payable, it

Wallace v. Madden.

is not competent for the society, by its constitution or by-laws, to narrow down this class or to deprive the member of his right to select any one included in the statutory class as his beneficiary. Niblack on Benefit Societies, 2d Edition, pp. 41 and 311; Martin v. Stubbings, 126 Ill. 387; Palmer v. Welch, 132 Ill. 141; Highland v. Highland, 109 Ill. 366; Hysinger v. Supreme Lodge, etc., 42 Mo. App. 627; Gentry v. Supreme Lodge, etc., 23 Fed. Rep. 718; Kentucky Masonic, etc., v. Miller, 13 Bush (Ky.), 489; Duval, etc., v. Goodson, 79 Ky. 224.

While it is no doubt true, as a general rule, that the member can not go outside of a class designated by the by-laws, as controlled by the organic law, it is also true that the courts will give a liberal construction to contracts of this character with a view to carrying out the wishes of the member, so far as may be at all consistent with the provisions of the organic law and the by-laws of the society. Bloomington Mutual Association v. Blue, 120 Ill. 121; Martin v. Stubbings, 126 Ill. 387.

THOMAS McENERNY, attorney for appellants.

WILLIAM DILLON, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The Catholic Order of Foresters is a fraternal benefit society under the laws of this State applicable to such societies.

February 20, 1895, one William Wallace, an unmarried brother of the appellants, became, and up to the time of his death, continued to be, a member in good standing of the society. The society is organized into a high court and subordinate courts, and in the latter applicants are initiated.

When initiated, an application, accompanied by a fee of fifty cents, is sent to the high court for an endowment certificate. In his application, William Wallace designated the appellee, as his affianced wife, as the beneficiary to whom payment was to be made of the thousand dollars to

which the right beneficiary would be entitled. The high court refused to issue a certificate for her benefit, of which he had notice, but it does not appear that any further action upon the subject was had by the society or Wallace, in his lifetime.

The act of June 22, 1893, provides that such societies "shall make provision for the payment of death benefits," and that "payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member." Sec. 1 of the act, page 130, State Edition Laws of 1893. The constitution of the society provides:

"2. Endowment may be made payable to the following classes of persons:

Class first: To a member's (1) wife, (2) children, or children of deceased children (such children taking the share of the deceased parent), (3) grandchildren, (4) parents, (5) brothers and sisters of the whole blood, (6) brothers and sisters of the half blood, (7) grandparents, (8) nieces and nephews, (9) cousins in the first degree, (10) uncles and aunts, (11) next of kin who would be the distributees of the personal estate of such member upon his death intestate, in either of which cases no proof of dependency shall be required before issuing the endowment certificate.

Class second: To any other person who is dependent upon the member for maintenance (food, clothing, lodging, or education), in which case written evidence of the dependency, within the requirements of the laws of this order, must be furnished to the satisfaction of the high secretary before the endowment certificate can be issued.

(5) No endowment shall be payable to a person or persons of the second class, mentioned in paragraph 2 of this section, unless the dependency therein required to be shown exists at the time of the member's death; in which case proof of such dependency at the member's death shall be furnished in writing to the satisfaction of the high secretary, before payment of the endowment shall be made. If, at the time of the death of such member, the dependency

Murphy v. L. S. & M. S. Ry. Co.

herein required shall have ceased, or shall be found not to have existed, or if the designation shall fail for illegality or otherwise, then the endowment shall be payable to the person or persons mentioned in class first, paragraph 2 of this section, if living, in the order of precedence as therein enumerated.

Sec. 5. In the event of the death of all the beneficiaries designated by the member in accordance with the laws of the order before the decease of such member, if he shall have made no other or further disposition thereof, the benefit shall be paid to the persons mentioned in class first, paragraph 2, section 2, of this article, if living, in the order of precedence as therein enumerated; and if no person of said class shall be entitled to receive such benefit by the laws of this order as herein expressly provided, it shall revert to the endowment fund."

The society acknowledged that it should pay somebody, and filed this bill of interpleader, bringing the money into court.

The Superior Court awarded it to the appellee.

That she was the object of the solicitude of Wallace, is clear. She is within the classes which by statute may be beneficiaries. That the order of precedence within those classes may be settled by the society, would seem to be true, but it is more difficult to say that the society may exclude those whom the statute includes.

No decided case in point has been called to our attention, but considering the general tendency to narrow the field of discretion to be exercised by societies of this general character, we are not prepared to say that the Superior Court erred in holding that the appellee was entitled to the money, and its decree is affirmed.

John J. Murphy v. The Lake Shore & M. S. Ry. Co.

1. RAILROAD COMPANIES—*Use of Car Couplers.*—It is not a question of law whether it be practicable and expedient for all railroads to use the same kind of coupling devices, and the most that the law requires is,

that every railroad company shall adopt such couplings as are found by experience to combine the greatest safety with practical use.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

SETH F. CREWS, attorney for appellant.

WM. McFADON, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant was a switchman, working for the appellee in its Englewood yards, and while so employed received the injury for which he sued.

At the conclusion of the evidence for the appellant, as plaintiff, the jury, under the direction of the court, returned a verdict of not guilty, and this appeal has followed.

Appellant was injured while attempting to couple together two freight cars that were provided with coupling devices of dissimilar construction and different height.

It is not claimed that the coupling devices were incapable of being united, but that it was more dangerous work than if they had been of like construction and on a level. Nor does it appear that either coupler was out of order.

The additional count to the declaration alleged that the "Jenney" coupler, with which one of the cars was provided, was about four inches lower than such couplers usually are when upon a car, but there was no evidence to support the allegation. In that regard, the evidence was, merely, that the "Jenney" coupler was four inches lower than the "malleable" coupler which was on the other car—which fact, for all that the record shows, may be true of all "Jenney" couplers as compared with "malleable" ones; and there was no evidence that being in such relative position to the other coupler made either coupler in any proper sense, out of order, and this is true notwithstanding the appellant testified that he supposed the two couplers were

Murphy v. L. S. & M. S. Ry. Co.

in good order, and that there was no mark indicating that they were not.

Appellant testified that there was less than four inches difference in the relative height of the slots of the two couplers, but did not state how much less.

From anything we can find in the evidence, we must regard that each of the two cars and their respective coupling devices were complete, and, in themselves, in perfect order, although not as well calculated for easy joining or coupling together as they would have been if the coupling device on each had been of the same pattern or kind.

But this latter circumstance does not of itself make a railway company liable to an injured switchman.

The evidence showed that the car provided with the "malleable" coupler belonged to the New York Central Railroad Company, while that having the "Jenney" belonged to the appellee. It is not a question of law whether it be practicable and expedient for all railroads to use the same kind of coupling devices, and the most that the law requires is, that every railroad company shall adopt such as are found "by experience to combine the greatest safety with practical use." *T. W. & W. Ry. Co. v. Asbury*, 84 Ill. 429.

There is no evidence that both the "malleable" and the "Jenney" were not approved and practical devices for car-coupling.

It was shown by the cross-examination of appellant that he had worked for twelve years as switchman for different railroads in Chicago, and that during all that time he had been in the habit of coupling cars having different coupling apparatus of varying heights.

Can, then, the appellant recover for an injury received by him in the discharge of his regular and familiar duties, when the apparatus which he was required to use was of an approved and practical kind, was familiar to him, and each part of which was perfect in itself?

We think the answer is plain that he can not.

The risk he took and from which he became injured, was

the ordinary risk of the service in which he was engaged. T., W. & W. Ry. Co. v. Black, 88 Ill. 112; I., B. & W. R. R. Co. v. Flanigan, 77 Ill. 365.

The sentiment of sympathy that we may privately indulge in because of the loss of the use of a hand by one of a class of men who are noted for the judgment and dexterity with which they perform their dangerous work, can not prevail over what we regard as being the settled law of the State, and we must affirm the judgment.

67 530
170 478

West Chicago Street Railroad Company v. Marion Carr.

1. MARRIED WOMEN—*Their Rights and Liabilities*.—Under the laws of this State, a married woman may earn money, which is her own, and for all her contracts, as well as for family expenses, which include medical attendance upon herself and members of her family, she is personally liable.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CRATTY BROS, JARVIS & CLEVELAND, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In the afternoon, June 30, 1893, the appellee, a middle-aged married woman, was a passenger in an open car of the appellant which was rounding the curve from the west to the north at the intersection of Harrison—an east and west street—with Fifth avenue—a north and south street. At the same time a heavily loaded wagon, going in the opposite direction, was rounding the same curve. Each being on

the right hand—to itself—track of the double track railway, it is obvious that the ends of the wagon, and the middle of the car were, in rounding the curve, each nearer to the track the other was on, than would be the case on parallel straight tracks.

The wagon turned to the right, and while the fore wheels were out of the track, the hind wheels staid in, and “slid” along in the track. This brought the hind end of the wagon still nearer to the other track, and into collision with the middle of the car, and severely injured the appellee. She sued and recovered. The amount of damages can not, on this record, be successfully questioned, unless some error of the court has led to an excess. There was testimony that the wagon was half way around the curve before the car entered upon it, with the hind end of the wagon swung over so as to cut off the passage of the car, and that a bystander on the sidewalk “hollered at the driver of the street car to let up, and he kept still going along.” The question of negligence was thus before the jury.

Objections made to her own testimony and the testimony of her physician as to the condition of her health before and after the injury, the results of the injury, and her declarations of pain, are not such that we should take time and space to answer them. Almost, if not quite, the only serious matter to consider, arises upon the admission of evidence as to the value of the services of her physician in attending her, and the giving of this instruction:

“If you find for the plaintiff, then in fixing the damages which she ought to recover, the jury should take into consideration all the circumstances surrounding the case, so far as these are shown by the evidence, such as the circumstances attending the injury; the loss of time of the plaintiff, if any, occasioned by the injury; the pain she has suffered, if any; the money she has expended or become liable to expend, if any, in endeavoring to be cured of such injury; the business she was engaged in, if any, at the time she was injured, and the extent and duration of the injury, and give the plaintiff such damages as the jury believe from the evi-

dence she has sustained, not exceeding in all the amount claimed in the declaration."

There had been some slight evidence that before her injury she had been engaged in labor additional to her housework, all of which she did, and that since the injury she could not do all of her housework.

Under the law of the State, a married woman may earn money which is her own; for all her contracts, as well as for family expenses, which include medical attendance upon herself and members of her family, she is personally responsible.

To the latter proposition, we cite *Cole v. Bentley*, 26 Ill. App. 260; *Younkin v. Essick*, 29 Ib. 575; and *Walcott v. Hoffman*, 30 Ib. 77.

There is no error, and the judgment is affirmed.

67	532
78	306

**John Lorenson, for use of Home Lumber Company, v.
Richard Rusk.**

1. GARNISHMENT—*No Recovery. Unless, etc.*—No recovery can be had for the benefit of a garnishing creditor unless his debtor could have maintained, in his own name, an action of debt or *indebitatus assumpsit* against the garnishee.

Garnishment Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

ELMER H. ADAMS, attorney for appellant.

E. S. CUMMINGS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a garnishment of the appellee by the Home Lumber Company, a judgment creditor of the appellant. The claim that the appellee was indebted to the appellant is

Steger v. Steger.

based upon a contract by which the appellant undertook to build a house for the appellee, the payments to be made upon the certificates of an architect. The appellant worked upon, but did not build, the house, and no certificate was ever issued by the architect. It is a fair conclusion, from the evidence heard by the judge on the trial without a jury, that at no time either before, at, or after the service of the garnishee summons upon the appellee, was he, either in law or morals, indebted to the appellant. No recovery can be had for the benefit of a garnishing creditor, unless his debtor could have maintained, in his own name, an action of debt, or *indebitatus assumpsit*, against the garnishee. *Sangamon Coal Mining Co. v. Richardson*, 33 Ill. App. 277; *Capes v. Burgess*, 135 Ill. 61.

This record contains nothing to show that Lorenson could ever have maintained such an action, and the judgment is affirmed.

John V. Steger v. Louisa Steger.

67	533
166s	579
67	533
173s	142

1. **SEPARATE MAINTENANCE—Fees Pendente Lite—Effect of the Settlement of the Suit upon.**—Although counsel for a wife, who is complainant in a bill for separate maintenance, may obtain an order for the payment of fees *pendente lite*, on making a proper case, yet if the controversy is settled by the parties by the voluntary return of the wife to the husband, and the abandonment of the suit, before counsel has procured such order, his right to it is gone.

Bill, for separate maintenance. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed in part and reversed in part. Opinion filed December 28, 1896.

W. J. LAVERY, attorney for appellant.

HERVEY H. ANDERSON, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On August 11, 1894, the appellee filed her bill against the

appellant, her husband, for separate maintenance, charging against him numerous specific acts of extreme cruelty. In September, 1894, the appellant answered the bill and filed his cross-bill for a divorce from the appellee, which cross-bill was answered by appellee.

Before appellant answered and filed his cross-bill, the Circuit Court ordered him to pay temporary alimony to the amount of \$50 dollars a week; and the sum of \$100 as solicitor's fee, and it is admitted that such solicitor's fee was paid.

When, at a later day, and on March 18, 1896, appellee's solicitor entered his motion to be allowed a further solicitor's fee, it was made to appear as recited in a *nunc pro tunc* order, entered June 24, 1896, as of March 18, 1896, that the controversy between the parties had been settled, and that the appellee had returned to her husband and was living with him; and thereupon the motion of appellant to dismiss his cross-bill was granted, and his motion to dismiss the original bill was continued for two days, as was also the motion for further solicitor's fees.

On the date to which said motions were continued, the same, together with a motion of appellee's solicitor to vacate the order dismissing the cross-bill, were continued and ordered to be placed on the contested motion calendar of the court.

On May 8, 1896, said motions remaining undetermined, the cause was referred to a master, to hear and report upon the value of the said solicitor's services from the beginning up to April 26, 1896, and as to payments made on account thereof.

The master reported, June 23, 1896, and found that the solicitor's services in the cause were reasonably worth \$1,120, and that he had paid out \$8, and had received \$100, and thereupon the court decreed, on July 28, 1896, that appellant within ten days, pay the balance of \$1,028, found by the master to be due to the solicitor, together with \$45 master's fees advanced by appellee's solicitor, and ordered that in default of so paying, execution issue.

Said decree also denied the motion of appellee's solicitor to vacate the order dismissing the cross-bill, and dismissed the original bill, but retained jurisdiction of the cause so far as might be necessary to enforce compliance with the orders concerning the payment of moneys as specified in the decree.

The answer of appellee to appellant's cross-bill was filed November 6, 1895, and from that time until March 18, 1896, when appellee's solicitor moved for further solicitor's fees, no steps appear to have been taken in the cause—at least no order of any kind was applied for or made.

And when the motion of March 18, 1896, was made, it was then brought to the notice of the court that the parties had settled their difficulties outside of court.

In the course of the hearing on the master's report, on July 28, 1896, an affidavit of the appellee, sworn to on March 21, 1896, and filed in the cause on April 27, 1896, was read.

The substance of such affidavit was as follows :

"That affiant has voluntarily returned to reside with her husband, the defendant herein, and is now residing with him. That she abandoned this suit some months ago, and this affiant states that she requested her attorney, H. H. Anderson, on several occasions, to have this suit dismissed, and this affiant has been and is now extremely anxious and desirous and hereby requests that said suit be forthwith dismissed out of court."

It was also made to appear by the affidavit of the appellant filed in the cause on May 7, 1896, that on said March 18, 1896, he, by his solicitor, informed the court that appellee had returned to reside with him, and had abandoned her said suit.

It will thus be seen that the solicitor for whose benefit the allowance of July 28, 1896, was made, had notice, at least as early as the day on which he entered his motion for such allowance, that his client had gone back to live with her husband, and, necessarily, that her right to prosecute her suit against her husband had ended.

May he thereafter keep the suit alive, contrary to her

will, and prosecute it for the purpose of securing to himself fees which he claims to have earned in the cause?

We held in the recent case of *Holmes v. Hamburger*, 67 Ill. App. 121, that all orders for alimony or suit money against a husband, party to a divorce suit, are to be made in favor or for the benefit of the wife, herself; and we do not think a solicitor, for the purpose of securing his fees, has the right, in opposition to the wishes of the wife, to prosecute a suit begun by her for separate maintenance or divorce, after she has abandoned it and her right to prosecute it has ceased by her return to live with her husband.

The very ground upon which the allowance for solicitor's fees rests, in such cases, is that the husband has been guilty of the offenses, or some of them, charged against him, and that it is proper and necessary that the wife should be allowed her reasonable solicitor's fees to enable her to make proof thereof.

The reasons why the scandal and injury to public morals and possible disgrace to a family attendant upon making proof of such matters merely to secure fees for counsel should not be permitted, contrary to the will of a wife and her husband who have settled their troubles and gone to live together again in peace and harmony, are happily stated in the opinion of the court in *McCulloch v. Murphy*, 45 Ill. 256, and appear to us to be as applicable to the case at bar as they there were.

And the conclusion of the court, there expressed, may be advantageously repeated here: "That, although counsel for the wife, who is complainant in a bill for divorce, may obtain an order for the payment of fees *pendente lite*, on making a proper case, yet if the controversy is settled by the parties by the voluntary return of the wife to the husband, and the abandonment of the suit, before counsel have procured such order, their right to it is gone."

In our opinion, all that was done concerning an allowance of solicitor's fees, after appellant dismissed his cross-bill and the court became informed that the parties had gone to living together again, and that the wife had abandoned her suit and wished to have it dismissed, was error.

Yost Mfg. Co. v. Alton.

We will therefore reverse the decree in so far as it directs the payment of any moneys by the appellant, and affirm it in all other respects.

Reversed in part and affirmed in part.

67 537
168 564

The Yost Manufacturing Co. v. Max R. Alton.

1. ATTACHMENTS—*Evidence of Debt Should Precede Evidence of Fraud.*—An affidavit upon which a writ of attachment is sued out is not evidence of a debt, and without evidence of a debt a plaintiff can not question the transactions of the defendant on the ground of fraud.

2. NEW TRIALS—*Newly Discovered Evidence—What Affidavit Should Show.*—Statements in an affidavit for a new trial “that the plaintiff, by the direction of this affiant, employed a large number of persons to ascertain the whereabouts of the witnesses” and “that such efforts were continuously and unremittingly made” give no information as to what efforts were made and do not show cause for a new trial on the ground of newly discovered evidence.

Attachment.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

WILBER, TURNER & HILL and DAVID J. WILE, attorneys for appellant.

OSBORNE, GUERIN & SHRIMSKI, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant sued out an attachment against the Climax Cycle Company and levied the same upon goods and chattels in the possession of, and claimed as his own, by the appellee, interpleading. At the close of the evidence, the court instructed the jury to find for the appellee.

The appellant put in no evidence that the Climax owed the Yost anything. The affidavit upon which the attachment was sued out, was no evidence of any debt.

Without evidence of the debt, the appellant could not raise any question of fraud upon it, as a creditor. Springer v. Bigford, 55 Ill. App. 198, 160 Ill. 495.

The affidavit upon which a motion for a new trial, because of newly discovered evidence, was based, is wholly hearsay as to diligence.

“That the plaintiff, by the direction of this affiant, employed a large number of persons to ascertain the whereabouts” of the witnesses, and “that such efforts were continuously and unremittingly made,” which is the language of the affidavit, gives no information as to what efforts were made; and besides, the affidavit is not in the bill of exceptions, and though read by us, in so doing we went out of the record. *Bowlan v. Lambka*, 57 Ill. App. 334.

The judgment is affirmed.

67 538
91 355

Chicago Sugar Refining Company v. M. R. Armington.

1. **CONTRACTS—Construction of.**—If a contract contains ambiguous words, or words of doubtful meaning, they should be construed most strongly against the party who executed the contract, and if a contracting party uses, over his own signature, words of doubtful meaning, they will be construed against him.

2. **WORDS AND PHRASES**—“*Prompt Shipment*,” and “*Ship at Once*.”—A sale was negotiated by telegraph, the principal difference being in regard to price, and the words “prompt shipment,” were used twice in the correspondence by the party wishing to sell, but the final message from the buyer was “ship at once.” *Held*, that the words “at once,” meant as promptly as circumstances would permit, and that they were not to be taken literally.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

WILSON, MOORE & MOLLVAIN, attorneys for appellant.

SMITH, HELMER, MOULTON & PRICE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for refusing to take and pay for corn.

Chicago Sugar Refining Co. v. Armington.

The only question argued by the appellant is, whether there was any contract. Premising that in the trade "prompt shipment" means to ship within ten days, the contract, if any there was, was made by telegrams, all on January 9, 1896, as follows. From appellee.

"Sell you ten cars white and ten cars yellow corn your works twenty-seven, prompt shipment. Answer quick."

From appellant: "You are too high; we are buying at twenty-six half. Wire quick."

From appellee: "Accept your offer on white and yellow corn, thirty cars, prompt shipment."

From appellant: "Ship at once."

Nothing is in dispute but the words "at once;" do they mean, not that the appellant accepted "prompt shipment," but made a counter proposition for shipment "at once?" The words "at once" have no peculiar meaning, only their ordinary meaning in the trade; "immediate shipment" is the phrase used in contradistinction to "prompt shipment" for shipping forthwith.

Going back to the telegrams, it will be seen that the only matter of negotiation between the parties was price. Twice the appellee had used the words "prompt shipment." In replies no notice was taken of them by the appellant. Had the appellant replied simply "ship," it would not be contended that such reply meant a hastening of the shipment, and we regard the addition of the words "at once" only as a sort of urging the appellee to be as "prompt" as circumstances would permit.

"If a contract contains ambiguous words, or words of doubtful construction, such are to be construed most strongly against the party who executed the contract.

If the contracting party uses, over his own signature, language of doubtful meaning, he can not complain when the construction is favorable to the other contracting party, who is not presumed to have chosen the expression of doubtful meaning." *Massie v. Belford*, 68 Ill. 290.

We think the appellee had the right to rely upon the last dispatch from the appellant as an acceptance of "prompt shipment," and the judgment is affirmed.

Herman Nathan, Adm., etc., v. Virgil M. Brand.

1. **ATTORNEY'S FEES**—*When Amount of Ground for Interference by Court of Review.*—A court of appeal will not reverse a decree on account of the allowance of an attorney's fee, if the allowance be justifiable under the evidence and permissible by the contract, unless it be such as the court itself knows to be exorbitant and oppressive.

2. **WORDS AND PHRASES**—"Reasonable."—Proof that a fee is usual, ordinary and customary is evidence that it is "reasonable;" and the best evidence, many times, of what is reasonable, is what is usual and customary.

Bill, to foreclose trust deed. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

WILLIAMS & KRAFT, attorneys for appellant.

JOHN S. COOK, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree of sale, entered in a suit brought by the appellee to foreclose a trust deed in the nature of a mortgage, made by appellant's intestate to secure payment of his certain promissory notes for the principal sum of \$10,000.

The decree found that there was due at the date of its entry the sum of \$13,513.33, in which amount was included \$500 for solicitor's fees.

The assigned excessiveness of such solicitor's fees is the main ground urged for a reversal of the decree.

Concerning solicitor's fees, the trust deed contained two separate provisions; one, that in case of a decree of sale being obtained, there should, out of the proceeds of sale, be first paid the costs of suit, etc., including, etc., "and reasonable attorney's and solicitor's fees," etc.; and the other, "that said grantors shall pay all costs and attorney's

fees incurred or paid by said grantee, or the holder or holders of said notes, in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this trust deed, or a holder of said notes, and that the same shall be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof."

The master, to whom the cause was referred, found and reported that \$500 was a "usual, reasonable and customary fee for the services rendered by the complainant's solicitor in this proceeding," and that the complainant had a lien for said sum of \$500 for his solicitor's fees, and was entitled to be paid the same out of the proceeds of the sale of the premises, and decree was entered accordingly.

One phase of appellant's argument is that because the only attorney who testified as to solicitor's fees, answered to the question of what the "usual, ordinary and customary" fee was for services in like proceedings, there was no evidence of what was a "reasonable" fee within the meaning of the contract between the parties to the trust deed.

The best evidence, many times, of what is a reasonable fee, is what is a usual and customary one. *Reynolds v. McMillan*, 63 Ill. 46; *Casler v. Byers*, 129 Ill. 657; *L. N. A. & C. Ry. Co. v. Wallace*, 136 Ill. 87.

We think, also, that if appellant had desired to object to the question because of its form, he should have done so at the time, when it could have been easily remedied. The objection he interposed was, that it was incompetent and immaterial, and it was properly overruled.

That the witness, upon cross-examination, was led to state a percentage basis as a means of arriving at what was usual and customary, and that such a basis, applied to the case at bar, would make a considerably less sum than \$500, might have, perhaps, justified the master in allowing a less sum than \$500 if appellant had introduced any evidence of a less sum being either customary or reasonable; but as he chose not to offer any evidence on the subject, we can not say the master was not justified in allowing the sum that the wit-

ness testified was a customary fee in foreclosure suits involving upwards of \$13,000.

Full indemnity is all that a mortgagee has a right to claim against the mortgagor, and the writer of this opinion takes the liberty to refer to what he said upon that subject in his separate opinion in *Stone v. Billings*, 63 Ill. App., at page 374, *et seq.* What has the mortgagee paid or incurred to pay, and is it usual and customary, ought, in the opinion of the writer, to be all that equity will permit a mortgagee to exact from a mortgagor, notwithstanding the provisions of their agreement.

But I do not understand any case to go so far as to hold that in the absence of an allowance that the court itself will know to be exorbitant and oppressive, a decree should be reversed if the allowance be justifiable under the evidence and permissible by the contract.

The decree of the Superior Court is affirmed.

Geo. M. Chamberlin v. Eugene Cary.

1. APPELLATE COURT PRACTICE—*What Abstracts Should Show.*—The Appellate Court will not consider a case upon its merits where the abstract is a mere index and gives no information from which the court can determine what the issue involved is, but will affirm the judgment.

Assumpsit, on two promissory notes. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

CHARLES B. STAFFORD, attorney for appellant.

IRA W. & C. C. BUELL, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We are told by the briefs filed in this cause, that the con-

67	542
109	34
67	542
97	880

troversy is entirely as to certain pleadings filed in an action of assumpsit.

The abstract here filed is as follows:

" PAGE.	The transcript in this case shows the following:
3-7	1. Declaration filed January 31, 1896.
11	2. Summons issued January 31, 1896.
12	3. Return on summons February 7, 1896.
12-14	4. Plea and affidavit of defendant filed February 17, 1896.
15-16	5. Replication of plaintiff filed February 24, 1896.
16	6. Rule on defendant to rejoin February 25, 1896.
17	7. Demurrer on replication filed March 3, 1896.
18	8. Ruling of the court sustaining demurrer, carrying back to plea and requiring defendant to plead over, entered March 19, 1896.
19-20	9. Plea and affidavit of defendant filed March 24, 1896.
21	10. Motion of plaintiff filed March 31, 1896.
21-22	11. Judgment on motion rendered March 31, 1896.
23-24-25	12. Bill of exceptions filed April 28, 1896.
25	13. Bond filed April 16, 1896."

Such an abstract gives us no information from which we can determine what the issue involved is.

It is not an abstract but a mere index.

For want of a proper abstract, the judgment of the Circuit Court is affirmed.

John J. Curran v. Patrick Foley.

1. BILL OF EXCEPTIONS—*What it Need Not Show.*—A bill of exceptions is not the proper place for either a verdict or judgment to be shown; the record proper which preserves itself and needs no bill of exceptions is the appropriate and only necessary place wherein they should appear.

67	543
91	581
67	543
94	2330

2. PRACTICE—*Objection to Amount of Damages Should be Made in Trial Court.*—An objection that the damages assessed against a defendant are excessive, can not be made for the first time on appeal.

Trespass on the Case, for a nuisance. Appeal from the Superior Court of Cook County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

GEORGE P. MERRICK, attorney for appellant.

JAMES MAHER, attorney for appellee; A. W. BROWNE, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee had owned and occupied as a family residence and for renting purposes, for upward of twenty-five years, a house and lot on West Fourteenth street, Chicago.

From about 1888, the appellant began to occupy a lot adjoining that of appellee with a machine shop and factory, and this action was brought, in 1892, to recover damages for the depreciation occasioned thereby to appellee's property, because of noise and vibration and the casting of cinders, smoke and water upon appellee's premises.

A verdict for six hundred dollars, and judgment thereon, was recovered.

Appellee objects that the bill of exceptions does not show the amount of the verdict, nor of the judgment entered thereon, and argues that such omission is fatal to this appeal from the judgment.

A bill of exceptions is not the proper place for either a verdict or judgment to be shown.

The record proper, which preserves itself and needs no bill of exceptions, is the appropriate and only necessary place for a verdict and judgment to appear, and they do so appear here. *Baldwin v. McClelland*, 50 Ill. App. 645; same case, 152 Ill. 42.

We waive consideration of the other technical objections urged against the appeal.

Scott v. Schnadt.

The last one of the errors assigned by the appellant is that the damages are excessive. Appellant's motion for a new trial was in writing, and excessiveness of damages was not one of the grounds thereof. It is too late to raise the question for the first time on appeal. *Stern v. Tuch*, 55 Ill. App. 445; *Brewer & Hoffman Co. v. Boddie*, 162 Ill. 346; *Hintz v. Graupner*, 138 Ill. 158.

So far as the other assigned errors have been argued, we refer to the opinion in *Curran v. McGrath* (p. 566, this volume), filed herewith, which was a suit by another adjacent owner to recover because of the same nuisance.

The judgment is affirmed.

Warren L. Scott v. Frederick L. Schnadt.

67	545
79	282

1. COURT RECORDS—*Amendments to*.—The records of a court can not be amended at a term subsequent to the one at which the order sought to be amended was made, upon information obtained from an affidavit of the attorney for one of the parties interested.

2. BILL OF EXCEPTIONS—*Papers Not Included in—How Treated*.—Papers which are certified by the clerk of the trial court to be copies of notices filed in his office can not be considered in the Appellate Court. Such documents can only be regarded when incorporated in a bill of exceptions.

Assumpsit, on special contract. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Appeal dismissed. Opinion filed January 7, 1897.

BURTON & REICHMANN, attorneys for appellant.

ALBERT N. EASTMAN, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It has been said that the best time to contest an election is before the polls close; so it may be said that the best time to correct a record is when it is made.

It was the old practice that the proceedings of a court were not kept in a book, but shown by "rolls," as they were called in England—"records" in New York. Tidd's Pr., 728; Graham's Pr., 341.

And the preparation of the roll was the duty of the attorney of the successful party. Tidd, 730; Douglass v. Vallop, 2 Burr. 722-3; 4 Ch. Gen. Pr., 107.

By that method the proceedings followed in consecutive order on the particular roll containing them; a result attained with greater security by a practice which has obtained sometimes in the United States of making, at the close of a case, a complete record, in a book, by copying all the proceedings in such consecutiveness.

By the practice here, the record books contain the proceedings of the court in chronological order, and usually, instead of the forms of the entries being prepared by attorneys who have made the law a study, such preparation is left to laymen of satisfactory chirography. In this case, May 2, 1896, a judgment was entered, appeal prayed by the appellant and granted, the appeal bond and bill of exceptions to be filed within thirty days.

The record states that May 27, 1896, it was "ordered that the time to file the bill of exceptions herein be, and is hereby extended twenty days." The record further states that June 9, 1896, it was "ordered that the time to file the bond and bill of exceptions herein be, and the same is hereby extended twenty days, and it is ordered that said order be entered *nunc pro tunc*, as of May 27, A. D. 1896." June 3, 1896, the appeal bond was filed. The appellee moves this court now to dismiss the appeal, also to strike the bill of exceptions from the case. The latter motion we shall not consider, for if no appeal is here because the bond was filed too late, we have no authority to do more than dismiss it.

May 2d was in the April term, May 27th in the May term, and June 9th in the June term. Whatever might be said of the validity of the order of May 27th, as being made before the original time for filing the bill of excep-

Scott v. Schnadt.

tions had expired, and therefore effectual as to the bill, nothing can be urged in support of the order of June 9th. U. S. Life Ins. Co. v. Shattuck, 159 Ill. 610.

The control of the court over the matter of the time for filing a bond, had expired June 1, 1896. The appellant relies upon other proceedings of the court below, to which we can do justice only by taking from the abstract literally as follows :

“Order of October 6, 1896, being in words and figures as follows, to wit:

On motion of the defendant's attorneys, it is hereby ordered, for the purpose of correcting and amending the record entered in this cause on the 27th day of May, 1896, and the 9th day of June, 1896, that the following be added *nunc pro tunc*, as of the 9th day of June, 1896, to the record made in this cause on the 9th day of June, 1896, by the court, but by mistake or inadvertence, omitted from the record thereof.

This order being entered for the purpose of correcting and amending the record made in this cause on the 27th day of May, 1896, said order as in fact made by the court on said date having extended the time to file bond and bill of exceptions twenty days, but having been incorrectly entered of record by omitting therefrom the extension of time of twenty days to file bond.

BILL OF EXCEPTIONS.

Filed October 6, 1896.

Cause coming on to be heard upon motion of the defendant to amend the record on the 6th day of October, A. D. 1896, in support of said motion the defendant read, and the court considered a certain affidavit in words and figures as follows :

‘I, A. F. Reichman, being duly sworn, on oath depose and say :

That I am one of the attorneys for the defendant in the above entitled cause; that on the 2d day of May, 1896, a judgment was rendered against the defendant therein, and

an appeal prayed and allowed and thirty days given within which to file bond and bill of exceptions.

That on the 27th day of May, 1896, pursuant to the usual and regular notice given, an order was entered in this cause, on motion of the defendant, extending the time to file said bond and bill of exceptions twenty days.

That by mistake or inadvertence the said order as made by the court was incorrectly entered of record in this, that said order as recorded made no reference to the extension of time to file said bond as ordered by the court.'

That said bond was thereafter duly approved and filed on, to wit, the 3d day of June, 1896.

That the attorneys for the said defendant did not learn of the mistake made in entering of record the order of May 27, 1896, until the 8th day of June, 1896, when I immediately, on said 8th day of June, 1896, served notice upon the attorneys for said plaintiff that the defendant would, on the 9th day of June, 1896, ask the court to enter an order correcting and amending the record of the order made and entered on the 27th day of May, 1896, hereinbefore mentioned.

That on the said 9th day of June, 1896, pursuant to said last mentioned notice, I appeared before his honor, Judge Barton Payne, of this court, who then and there signed and entered a written order prepared by myself, which said order was substantially as follows, to wit:

'On motion of the defendant's attorneys it is ordered that the time to file bond and bill of exceptions herein, be and is hereby extended twenty days *nunc pro tunc*, as of May 27, 1896, this order being entered for the purpose of correcting and amending the record of the order made in this cause on the 27th day of May, 1896, said order as in fact made by the court on said date having extended the time to file bond and bill of exceptions, and by mistake or inadvertence, having been incorrectly entered of record by omitting therefrom the extension of time to file bond.'

That said order, together with the notice above referred to, was handed to, and left with, the minute clerk of said court.

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That since the said 9th day of June, 1896, I have not seen said written order, signed as aforesaid.

That on the 2d and 3d day of October, 1896, I made a diligent search for the same, in the office of the clerk of this court, but was unable to find the same, either in the files of said cause or in said office.

That the said order so prepared and signed and entered as aforesaid, was not spread upon the records of this court, but instead and in lieu thereof, the following record entry of said order was made, to wit:

‘On motion of the defendant’s attorney, it is ordered that the time to file bond and bill of exceptions herein be, and is hereby, extended twenty days, and it is ordered that said order be entered *nunc pro tunc*, as of May 27, 1896.’

A. F. REICHMANN.

Subscribed and sworn to before me, this 5th day of October, 1896.

[SEAL.]

JOHN E. ERWIN,
Notary Public.”

The above affidavit being filed, and the said motion made, in pursuance of a certain notice, as follows:

“You are hereby notified that on Tuesday, the 6th day of October, 1896, at 10 o’clock A. M., before his honor, John Barton Payne, in the court room usually occupied by him, we shall ask for an order correcting and amending the record of the order heretofore entered on the 27th day of May, 1896, and on the 9th day of June, 1896, in accordance with the facts and the order in fact made by the court in the above cause; and that upon said hearing we shall use the affidavit of A. F. Reichmann, hereto attached, in support of said motion, at which time and place you may appear if you see fit.

Dated October 15, 1896.

BURTON & REICHMANN,
Attorneys for Defendant.

Service of the above notice accepted this, the 5th day of October, 1896.

ALBERT N. EASTMAN,
Attorney for Plaintiff.”

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Which was all the affidavits, records, writings, and evidence offered, heard or considered by the court on the hearing of said motion. Thereupon the court entered a certain order in words and figures as follows:

(Order of Oct. 6, 1896.)

To the consideration of which motion, the reading and consideration of said affidavit, and the entry of said order, plaintiff excepted."

It will be observed that the order of October 6th is based wholly and exclusively upon the affidavit and notice recited in the bill of exceptions, so that in fact the amendment is made upon the recollection of the attorney, and nothing else.

That is not enough. *Tynan v. Weinhard*, 153 Ill. 598, so decides, and cites many cases.

The effort of the appellant was not to restore a record which had once existed—afterward lost or destroyed—but to make a record of matter which has never gone into the record at all.

The appellant has filed here a couple of pages, which the clerk of the Superior Court certifies are copies of notices filed in his office. We can not so regard them; such documents can come here only by being incorporated in a bill of exceptions. *Bowlan v. Lambka*, 57 Ill. App. 334.

The bond being filed too late, the appellee is entitled to have his motion to dismiss sustained. *Wormley v. Wormley*, 96 Ill. 129; and it is done at the cost of appellant.

67	550
68	640

Joseph W. Wierman v. The International Building, Loan and Investment Union.

1. CORPORATIONS—*Limitations on the Power to Make By-Laws.*—A corporation has no power to make by-laws inconsistent with the law of the land, its charters, or the statute under which it was created.

2. BUILDING ASSOCIATIONS—*Must Treat Their Members Equally.*—A building association is a mutual company and is bound to treat its

Wierman v. International Building, etc., Union.

members equally, and any by-law or contract made by such an association in contravention of such mutuality is *ultra vires* and void.

3. SAME—*Can Not Guarantee Time of Maturity of Stock*.—All contracts and agreements of building associations to the effect that after the payment of a certain sum, less than its face value, stock shall be considered fully paid, are *ultra vires* and void.

Bill, for cancellation of note and reconveyance of property conveyed as security. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 4, 1897.

ALEX. J. JONES, attorney for appellant.

ALLAN C. STORY and RUBENS & MOTT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The brief of appellant in this case begins with this statement: "The International Building, Loan & Investment Union, the appellee, is a building and loan association organized under the laws of Illinois, April 16, 1887. Wierman, the appellant, on April 19, 1890, became a member of the association."

Appellee having been so organized and now so existing, it necessarily was and is a mutual company, and appellant, as a member thereof, was and is entitled to such rights, and none other, as might be accorded to any other member. In other words, appellee, as a mutual company, was bound to treat its members equally, and any by-law or contract by it made in contravention of such mutuality, was and is *ultra vires*. A corporation has no power to make by-laws inconsistent with the law of the land, or with its charter, or the statute under which it was created. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159-182; *Thompson on Corporations*, Sec. 1011; *Morawetz on Private Corporations*, Secs. 367, 368.

The by-laws in question, under and by virtue of which the contract with appellant was made, are clearly in violation of the charter of appellee, and the contract of appellant with appellee was and is, as a contract, void.

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The Supreme Court of this State, in the case of Rhodes et al. v. Missouri Savings & Loan Co., opinion filed November 11, 1896, held that building and loan associations have no power to issue what is known as "paid-up" stock. It follows necessarily from this, that such associations have not power to issue stock with an agreement that at any time before the actual payment of the face value thereof, such stock shall, by earnings or interest thereon, become fully paid. In the nature of things, it is the case that a building and loan association can not, in advance, know that at any period before the face amount of stock has been paid, the earnings thereon, when added to the amount actually paid, will make it full paid, because what amount or per cent will, in the conduct of the business, be actually earned, can not be known in advance.

All contracts and agreements of building associations to the effect that after the payment of a certain sum, less than the face value, stock shall be considered full paid, are *ultra vires* and void.

The contract under consideration being one repugnant to the statute under which the corporation was created, all persons are chargeable with notice that it was within the powers of appellee. The contract, however, was one which did not involve moral turpitude upon the part of appellant. It was an agreement not *malum in se*, but *malum prohibitum*.

The benefit received by appellee under the arrangement which it made with appellant, is not the alleged contract which it entered into with him, but the money which has been actually paid by him; in other words, as the case now stands, appellant obtained a loan from appellee, which should have been made only in accordance with its chartered rights, so that the terms given to him should not be variant from those offered to every other stockholder and borrower. The money paid by appellant is not to be confiscated, but he is not entitled to anything which appellee had not, under its charter, a right to accord to every member, and he is subject to the burdens imposed upon every member and borrower of the class to which he belongs.

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As we understand, appellee, while holding that the contract of appellant is void, is willing to and is proceeding to treat him equitably and justly. The bill of appellant was therefore properly dismissed, and the decree of the Circuit Court is affirmed.

The judgment entered in this court on the 14th day of December, 1896, will be set aside, and a judgment this day entered affirming the decree of the Circuit Court.

MR. JUSTICE GARY.

I adhere to my original opinion, filed December 14, 1896, which is now my dissenting opinion.

OPINION BY MR. JUSTICE GARY, DELIVERED AS THE OPINION OF THE COURT ON DECEMBER 14, 1896.

This case was heard upon bill and answer, and there is no dispute as to facts—only as to the law upon those facts.

The appellee is a corporation under, or at least under color of “An act to enable associations of persons to become a body corporate to raise funds to be loaned only among members of such associations,” in force July 1, 1879.

We say under color of that act, because we understand that the purpose of that act is, that the whole profit which shall accrue in the conduct of such a corporation, is for the benefit of the shareholders equally. It does not appear that the appellee issued its shares in different series, as is usual with such institutions. The by-laws fixed the capital stock at \$7,000,000, in shares of \$100 each, and provides that “A series of stock, the number of shares to be fixed by the board of directors, shall be issued at the first meeting of each quarter, and at such other times as may be directed by a vote of the board.”

Another by-law is:

“And it is hereby expressly agreed between all shareholders and this union that a payment of \$100 per share named in his or her certificate that has been in force six years shall be accepted as full payment of all claims on their certificate or against this union.”

The appellee was incorporated in the spring of 1887, and April 19, 1890, issued a certificate for ten shares of its stock,

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not mentioning any series, to the appellant, which certificate contained the words: "The said International Building, Loan and Investment Union agrees to pay said shareholder or his heirs, executors, administrators or assigns, the sum of \$100 for each of said shares, at the end of six years from the date hereof."

A by-law provides that "All shares must be in force six months before said shareholder shall be entitled to a loan, or shall have six monthly installments paid thereon, and hold receipts for same."

And another that "The said shareholder shall not have any claim to any interest in the affairs, assets or funds of this union, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever, except as herein described."

In September, 1890, the appellant borrowed from the appellee \$1,000 dollars, secured by trust deed in the nature of a mortgage. He paid all his dues, interest, etc.—everything that the appellee could claim—until the expiration of the six years named in his certificate, and then demanded his note and a re-conveyance in pursuance of a stipulation in the deed that when the indebtedness was paid, the premises should be re-conveyed.

We pay no heed to the suggestion or insinuation that the president and secretary could not make the provision as to six years binding upon the appellee.

The certificates are, without doubt, issued upon a printed form adopted, if not by vote of the directors, at least by uniform usage and practice of the appellee. If it be competent for the appellee to make such a contract, it has made it. Now, this corporation is not purely mutual. How otherwise it may be, we need not inquire; and probably more skill as financiers than is ordinarily possessed by judges, is necessary to see how and for whom the scheme can be worked to a profit.

It is very certain that the by-laws intend that somebody shall have a profit.

On its face, the six years provision is not *ultra vires* of such a corporation as the by-laws govern.

Best Brewing Co. v. Vinterum.

Whether such by-laws are *ultra vires* of such a corporation as the statute intends, we will not consider.

The corporation incurred the obligation and enjoyed the benefit it asked. It may not now repudiate. *Kadish v. Garden City, etc.*, 151 Ill. 531.

This bill was filed to enforce the contract, which in effect is to surrender the note of the appellant and re-convey the premises in exchange for his certificate.

The court below dismissed the bill. The decree is reversed and the cause remanded, with directions to that court to grant the relief appellant seeks.

The Best Brewing Company v. S. J. Vinterum, doing business as United States Show Case Company. 67 555
e105 528

1. GUARANTY—*Effect of Acceptance of Note—Days of Grace.*—Two persons entered into a contract by which one of them guaranteed a debt of a third person to the other, due in sixty days, it being understood that the sixty days credit should be evidenced by a promissory note. *Held*, that the taking of such note, payable in sixty days, was not a variance of the contract, because of the addition of three days time, arising from the fact that days of grace would attach to the note.

Transcript, of justice of the peace. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

WILLIAMS & KRAFT, attorneys for appellant.

SMOOT & EYER, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In an action begun before a justice of the peace, and appealed to the Superior Court, the appellee recovered a judgment for \$106 against the appellant, upon a trial in the latter court without a jury.

The basis of the action was a written guaranty as follows :

“THE BEST BREWING CO., OF CHICAGO,
S. W. Cor. Fletcher and Herndon Streets,
Bottling Department.

CHICAGO, Jan. 25, 1895.

U. S. Show Case Co.

GENTS: We will guarantee the indebtedness of Mr. Wolins to the amount of one hundred and eighty-six (\$186) dollars.

Respy.,

BEST BREWING CO., OF CHICAGO. G. M.”

Appellee had been accustomed to conduct his business under the name of the United States Show Case Company, in connection with his own name, and was so carrying it on when the guaranty was given.

Some time before the guaranty was given, the appellee had contracted with the Mr. Wolins mentioned in the writing, to manufacture and set up for him certain store fixtures at an agreed price of \$211, on which Wolins paid at the time twenty-five dollars. For the balance it was agreed that appellee should give Wolins a credit of sixty days for whatever Wolins should not be able to pay in cash, before the account was rendered.

It is fairly inferable from the evidence and circumstances, that before the fixtures were finished the appellee had refused to deliver them without being paid for them or having security, for Mrs. Wolins went to the office of appellant and made some statements to its president which induced him to accompany her to the business place of appellee. Arriving there, a conversation was had between the president of appellant and the appellee, in the course of which, as testified by appellee, he said he would not deliver the fixtures until the account was guaranteed. The conversation resulted in the written guaranty in question being mailed from the appellant's office to the appellee. Thereupon the appellee completed and delivered the fixtures, and took Wolins' note at sixty days, dated February 8, 1896, for \$106, which was the balance then unpaid.

The main contention of the appellant is, that the guaranty

was intended only as security that Wolins would pay the amount then unpaid, at or before the delivery of the fixtures, and that because the time of payment was extended by the taking of said note, the appellant, as guarantor, became released.

It will be observed that the written contract of guaranty is silent as to the time of payment. The fact that it was given, establishes that a credit was contemplated, but whether for sixty days, as claimed by the appellee, or only for such time as was required to complete and set up the fixtures in the store of Wolins, as claimed by the appellant, is matter of serious dispute.

The appellee, and the president of the appellant corporation, testified in direct opposition to one another on that point, and Mrs. Wolins, who was the only other person present when the conversation took place, was not called as as a witness.

Under such circumstances we can no more overturn the finding of the trial judge as to what the truth was, than we could the finding of a jury, upon a controverted question of fact.

But it is contended by the appellant that even though the guaranty should, upon the facts, be given the force that appellee contends for, viz., that a credit of sixty days time was contemplated by the parties, still, the appellee, by accepting a note of Wolins, payable sixty days after its date, released the guarantor, because, including days of grace, sixty-three days credit instead of sixty days was given to Wolins.

We held, in *Richards v. Matson*, 51 Ill. App. 530, that promissory notes secured by a chattel mortgage, and payable two years after date, did not mature until three days after the expiration of the statutory limit concerning the lien of chattel mortgages, and that the lien of the mortgage was, therefore, subsequent to that of judgment creditors levying upon the mortgaged chattels. And although in that case we cited *Appleton v. Parker*, 15 Gray, 173, we placed our decision upon the express ground that to hold

otherwise would contravene the statute of the State limiting the lien of chattel mortgages to two years against execution creditors.

We must assume that the trial court found from the facts, that the parties contemplated that the promissory note of Wolins was given for the balance of the account, and that it was to be given for sixty days. The evidence tended to support such a finding, and was sufficient to justify it.

The testimony of the appellee was, that he told the president of the appellant that Wolins was to have sixty days time on the unpaid balance of the price, and had promised to give his note for it; that the president replied, "All right, if you want me to discount the note I will do so," but that appellee answered, "I don't want you to discount the note. Your guarantee is good enough for me." The only testimony given by the president upon the subject of the giving of a note, was his answer, "No, sir," to an inquiry of him, "Do you know anything about this note?"

If it were contemplated by the parties that the sixty days credit should be evidenced by a promissory note, and such we are bound to consider was the finding of the trial court, then we are not prepared to hold, as matter of law, that the taking of such note, payable at sixty days, was a variance of the contract in the contemplation of the parties, merely because of the addition of three days time, arising from the fact that days of grace would attach to the note.

As was held in *Smith v. Dann*, 6 Hill, 543, a guaranty of a credit of three months to a third party, was not varied by the taking of a promissory note payable three months after date, which carried the additional time of three days grace; and the decision was justified on the ground that guaranties, like other commercial contracts, must be construed with reference to the usages of trade to accept notes entitled to days of grace in fulfillment of contracts to be performed within the time specified in the notes, without regard to days of grace.

We held, in *Richards v. Matson*, *supra*, that we could not follow the decision of *Smith v. Dann*, where to do so would

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contravene the express provisions of our statute concerning chattel mortgages, but we regard the rule to be a just and proper one when applied to a commercial contract, like a guaranty, that in no way contravenes public policy, nor any statute.

Such a rule commends itself to us in preference to that announced in *Appleton v. Parker*, *supra*, and it is in conformity with the rulings of the trial court in refusing to hold certain propositions of law to the contract.

The case of *Louisville Manufacturing company v. Welch*, 10 Howard, 461, possesses numerous features similar to those in the case at bar.

The appellant further contends that the judgment should be reversed because, as argued, the appellee was engaged in carrying on the business out of which the guaranty arose in violation of law, and bases its contention on that section of the criminal code which subjects a person to fine, who "puts forth any sign of advertisement, and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated," etc.

This court said in *Edgerton v. Preston*, 15 Ill. App. 23 : "What the statute denounces is not merely the assuming of a corporate name, but the putting forth a sign or advertisement and therein assuming a corporate name for a particular purpose, namely, for the purpose of soliciting business. * * * It is the purpose for which the act is done, that gives character to the act.

What the legislature had in view in enacting this section of the criminal code, manifestly was to prevent persons from obtaining a fictitious credit by advertising themselves as being a corporation when they were not incorporated."

There was no sufficient evidence in the record to warrant us in holding that the appellee violated the statute in any respect, either by soliciting the job in question, or any other business, under the corporate name.

Believing that we have disposed of all the material questions presented, we will affirm the judgment.

**Bartholomae & Roesing Brewing & Malting Company,
and F. S. Winston, Trustee, v. William Schroeder,
Sr., and William Schroeder, Jr.**

1. **MASTERS IN CHANCERY**—*When Finding by, is Conclusive.*—When witnesses testify in the presence and hearing of a master on all disputed questions of fact, where there is testimony so taken tending to establish the facts found, the finding of the master in such case as to the matters referred to him, in regard to the facts established by the testimony, is as conclusive as the verdict of a jury in a civil cause, and will be reviewed or set aside only for the same reasons that a verdict will be.

2. **HOMESTEAD**—*What May be Included in.*—The fact that there are two dwellings upon a single lot, only one of which is actually occupied by the owner, does not restrict the homestead interest of such owner to the house in which he lives.

3. **SAME**—*May be Sold or Mortgaged.*—The owner of a homestead may sell or mortgage such estate, free from the lien of any judgment upon the premises, and the grantee in such a case takes the homestead estate which the grantor owned. Such sale is not an abandonment, but a conveyance of an estate in and to the premises.

Bill, to foreclose mortgage. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded, with directions. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

On the 28th of December, A. D. 1894, Frederick Remus and Wilhelmina Remus, his wife, being indebted to the Bartholomae & Roesing Brewing and Malting Company in the sum of \$1,000, executed their promissory note for that amount, payable to the order of themselves, one year after date, with interest at six per cent per annum, payable semi-annually, and at seven per cent per annum after maturity, and indorsed and delivered the same to the Brewing Company. To secure said note they also, on the same date, executed their certain trust deed to Frederick S. Winston, trustee, in and by which said trust deed they conveyed to him as trustee, certain property in Cook county known as lot 69 in block 33 in Sheffield's Addition to Chicago, and therein

and thereby released and waived all their rights under and by virtue of the homestead exemption laws of the State of Illinois, to the lands and premises aforesaid and proceeds of sale thereof, which said trust deed was duly acknowledged, and afterward recorded on the 29th day of December, A. D. 1894, in the recorder's office of Cook county.

The trust deed, among other things, provided that in the event of the failure of the mortgagors to keep the covenants and conditions thereof, and in the event of their failure to pay the principal or interest, or any part thereof, at the time or times specified in the said instrument, that the legal holder of the note might, at his option, declare the whole of said sum due, and take possession of the property and file a bill to foreclose the same, together with all reasonable costs of the proceeding, ten per cent solicitor's fees, and such other necessary costs and expenses as the legal holder of the note might have expended in relation to the same.

The property thus conveyed consisted of a lot known as No. 892 Girard street in the city of Chicago. It was improved with a two and one-half story brick building in front, and a two-story frame building on the rear.

At the time of the execution and delivery of the said promissory note and of the execution, acknowledgment, delivery and recording of the said trust deed, Remus and his wife were living in the frame building on said lot. They were occupying the said lot and had so occupied it continuously for many years, as a homestead.

Some time subsequent to the recording of the trust deed, Remus removed a portion of his personal effects from the premises on Girard street to certain premises known as No. 400 North Ashland avenue, where he opened a saloon and partially resided for several months. At the time of this removal he left a portion of his personal effects in the premises at No. 892 Girard street. On the 24th day of August, 1895, Remus removed all of his personal effects taken by him to the premises at No. 400 North Ashland avenue, back to the premises at No. 892 Girard street into one of

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the flats in the brick building on the front part of said lot 69. During the time the personal effects in question had been in the premises at No. 400 North Ashland avenue, Remus had kept a kitchen in the premises on Girard street, but it does not appear whether he slept there or not.

On the 28th day of June, 1895, Remus and his wife defaulted in the payment of the interest due to the Bartholomae & Roesing Brewing and Malting Company, under and by virtue of their promissory note, and that company subsequently, on the 30th day of September, 1895, filed its bill of complaint to foreclose the trust deed in question. Among the parties defendant to this foreclosure proceeding were William Schroeder, Jr., and William Schroeder, Sr. Service was had upon all the defendants, and answers and amended answers were filed by each of them, and in due time replications were filed by the complainant to said answers.

In February, 1896, the said Schroeders filed a cross-bill, in and by which said cross-bill they averred that on the 27th day of September, 1894, judgment had been entered in their favor against Frederick Remus in the Circuit Court of Cook County for the sum of \$548, which said judgment was still due and unpaid, and in and by which said cross-bill they prayed that the same might be decreed to be a superior lien upon the premises described in the original bill of complaint, to that of the complainants, Frederick S. Winston, trustee, and the Bartholomae & Roesing Brewing and Malting Company.

The case proceeded to a hearing before a master in chancery; as between the complainants and Frederick Remus and wife, both the master and the Circuit Court found that all the allegations of the complainants' bill were sustained, and decree was so entered.

As between the complainants, the Bartholomae & Roesing Brewing and Malting Company and Frederick S. Winston, trustee, and the cross-complainants, William Schroeder, Sr., and William Schroeder, Jr., the master found that at the time of the removal of Remus from the premises at No. 592

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Girard street to the premises at No. 400 North Ashland avenue, he did not intend to abandon his homestead in the first mentioned premises; that at the time of the recovery of the judgment in favor of the said Schroeders, the said Remus had a homestead in the premises known as lot 69; that he had not since that time abandoned said homestead, and that although the judgment of the said Schroeders was obtained prior to December 29th, the time when the trust deed was recorded, nevertheless inasmuch as the said Remus had conveyed by his trust deed his homestead estate in said premises, the complainants had a preferred lien upon the premises to the extent of \$1,000.

To this report the cross-complainant filed various objections, among which were the following:

“ 4. For that the said master has found that said Remus and wife did not abandon their homestead in the premises in question, whereas said master should have found that they abandoned said premises and had no homestead therein, and that therefore these cross-complainants are entitled to prior and superior claim and interest to the other parties to this cause.

5. For that said master has found that said brewery is entitled to a prior lien upon the premises in question to the extent of \$1,000, whereas said master should have found that the said claim of the brewery was subject to these cross-complainants' interest in said premises.”

These objections were overruled by the master. Subsequently the same objections were filed as exceptions in the Circuit Court.

On June 1, 1896, the exceptions came on to be heard before the court, and at such hearing the court sustained exceptions 4 and 5 aforesaid, and the court found that there had been an abandonment of the homestead estate in lot 69 by the said Remus and his wife subsequent to the recording of the trust deed to the complainant, and that the judgment lien of the cross-complainants was a prior lien upon the premises to that of the complainant, the Bartholomae & Roesing Brewing and Malting Company. It was therefore ordered,

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adjudged and decreed that in the event of the failure of said Frederick Remus and Wilhelmina Remus, his wife, to pay the amount found due to the complainants within five days subsequent to the entry of the decree, that the premises be sold, and that out of the proceeds there (first) be paid the costs of the litigation; (second) the judgment of the cross-complainants, and then out of the surplus, if any there was, the claim of the complainants. To the entry of the decree the complainants objected and appealed therefrom.

WINSTON & MEAGHER, attorneys for appellants.

HENRY N. STOLTENBERG, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

When witnesses testify, in the presence and hearing of the master, on all disputed questions of fact, where there is testimony so taken tending to establish the facts found, neither the chancellor, nor an Appellate Court on appeal, will review the master's findings in regard to the weight to be given to such evidence taken before him. The finding of the master in such case, as to matters referred to him, in regard to facts found to be established by the testimony, is as conclusive upon the parties as the verdict of a jury in a civil cause, and will be reviewed or set aside only for the same reasons that a verdict will be. 14 Am. & Eng. Ency. of Law, 940, notes 2 and 3; note 5, p. 1321, Vol. 2, Fifth Am. Ed., Daniell's Ch. Pl. & Practice; Whitcomb v. Duell, 54 Ill. App. 650; Friedman v. Schoengen, 59 Ill. App. 376; Howard v. Scott, 50 Vt. 48; Williams v. Lindblom, 163 Ill. 346; Hudek v. Ennesser, 66 Ill. App. 609.

There was no evidence warranting a setting aside of the findings of the master as to the homestead of Mr. Remus.

The fact that there were two buildings upon a single lot, only one of the dwelling houses being actually occupied by Remus, did not restrict his homestead interest to the house in which he lived. Stevens v. Hollingsworth et al., 74 Ill. 202; Hubbell et al. v. Canady, 54 Ill. 425.

If the property were susceptible of division, and the house occupied by Remus were, with the land upon which it was situate, of the value of more than one thousand dollars, a court of equity might, it would seem, under the authority of *Stevens v. Hollingsworth, supra*, separate and set off a homestead in such portion. Without such segregation, the homestead lien adheres to the entire premises.

The owner of a homestead may sell or mortgage such estate free from the lien of any judgment upon the premises; the grantee in such case takes the homestead estate which the grantor owned; such sale is not an abandonment, but a conveyance, of an estate in and to the premises. *McDonald v. Crandall*, 43 Ill. 231-236; *Hartwell et al. v. McDonald*, 69 Ill. 293-296; *Lorrimer v. Marshall*, 44 Ill. App. 645; *Nichols et al. v. Spremont*, 111 Ill. 631-633.

Mr. Remus owned, in the premises in question, an estate of homestead; this he mortgaged; such mortgage had precedence as to the homestead estate over the judgment of appellee, because the judgment was not a lien upon such estate.

The decree of the Circuit Court awarding to appellees a precedence as to their judgment is reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the complainants' bill, and the report of the master.

MR. PRESIDING JUSTICE SHEPARD.

I concur with the majority of the court that the decree should be reversed, but not on the broad ground that the opinion seems to take, that the chancellor is concluded by the findings of the master upon disputed facts.

Where, except, perhaps, in matters of account, or of a reference as to some particular fact in dispute, a chancellor is willing to assume the labor of examining into the correctness of the findings of facts reported by the master, I think he may do so, in accordance with the long established practice in that regard in this State; and if he arrives at a different result than the master did, I should prefer to give the greater weight to his conclusion, even though he did not

see and hear the witnesses testify. I do not think that either under the statute concerning masters, or the practice in chancery as it prevails in this State, the findings of facts by masters in causes referred to them by a general order to take proofs and report the same with their conclusions, should be given such controlling effect as we have held; and I should be glad to retract in that direction, rather than to advance under the lead of decisions in some other States, where, perhaps, different powers than here exist may have been conferred upon masters, either by statute or settled practice.

John J. Curran v. Patrick McGrath.

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67	545
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1. DOMESTIC RELATIONS—*Presumptions as to Ownership of Property of Family.*—The law presumes, in the absence of evidence to the contrary, that a married man is the head of his family, and that the property in his possession is his own.

2. NUISANCES—*Noise and Smoke--Defenses.*—Mere noise may be a nuisance, and smoke and vibration of machinery aggravate such nuisance, and the fact that others in the same vicinity are in like manner incommoded is no answer to an action by an injured party.

3. VALUE—*What Admissible to Prove.*—Where the value of property is in question, offers to buy are admissible for the party who wishes to keep the property, the good faith of the offer and the ability of the party making the same to pay being subject to inquiry.

Trespass on the Case, for a nuisance. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

GEORGE P. MERRICK, attorney for appellant.

JAMES MAHER, attorney for appellee; A. W. BROWNE, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. The law presumes, in the absence of evidence to the con-

Curran v. McGrath.

trary, that a married man is the head of his family, and that the property in his possession is his own. *Smith v. Slocum*, 62 Ill. 354; *McVey v. McQuality*, 97 Ill. 93.

This is an action by the appellee against the appellant for damages to the house and lot of the appellee, which he had occupied with his family for twenty years, and thereafter let to tenants, by the smoke, noise and vibration produced by the manufacturing establishment of the appellant on a lot near to the premises of the appellee—one lot between.

The mere noise is a nuisance. *C., M. & St. P. Ry. v. Drake*, 148 Ill. 226.

The smoke and vibration aggravate the nuisance, and the fact that others in the vicinity were in like manner incommoded, is no answer to the action of the appellee. *Wylie v. Elwood*, 134 Ill. 281.

Except as to the damages, which was a question for the jury upon conflicting testimony, the only question is whether there was error in permitting the appellee to state after he had, on a question by the appellant, testified that he parted with his title in 1892 for \$3,700, that in 1888 he was offered \$4,500. Under the Eminent Domain Act, it has been decided that for the petitioner, evidence of the price at which other property in the neighborhood was offered for sale, was competent. *C. & W. I. R. R. v. Maroney*, 95 Ill. 179. Much more would such offers of the same property be competent; and if for the party who wants to take the property, offers to sell are admissible, then, in principle, offers to buy must be admissible for the party who wants to keep. The good faith of the offer and the ability of the party making the offer to pay, would be subject to inquiry.

There is no error, and the judgment is affirmed.

**William V. Tascher and Centaur Novelty Manufacturing
Company v. George W. Timerman.**

1. **COURTS OF EQUITY—*Will Not Entertain Frivolous Controversies.***—It is the duty of a court of equity to prevent its time from being consumed in frivolous controversies, to the detriment of suitors who are entitled to its attention, and it will decline to entertain them, although the defendants make no specific objection on this ground by demurrer or otherwise.

2. **CORPORATIONS—*Agreement Concerning Management of, Not Enforced Specifically.***—A contract between two parties who are about to form a corporation, in regard to the management of the corporation, which is not assented to by other persons who subsequently acquire interests in such corporation, will not be specifically enforced.

Bill, for receiver and injunction. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

WM. R. WAGNER, attorney for appellants.

LOUIS M. GREELEY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

October 22, 1895, Tascher and Timerman made an agreement as follows:

“ AGREEMENT.

William V. Tascher,	George W. Timerman,
Mishawaka, Ind.	Denver, Col.

In consideration of the sum of three hundred dollars (\$300) in hand paid, the receipt of which is hereby acknowledged, I, William V. Tascher, enter into an agreement with George W. Timerman for the sale, transfer and delivery to the said G. W. Timerman, of one-half interest in the Centaur Novelty Manufacturing Co., of Mishawaka, Ind., same being duly incorporated, with a capital stock of \$25,000, upon the following conditions:

1st. That the said G. W. Timerman is to place the sum of

Tascher v. Timerman.

five thousand dollars (\$5,000) into the treasury of the Centaur Novelty Manufacturing Co., this consideration to belong to this above mentioned corporation, and the money to be expended in enlarging and extending the business of the Centaur Novelty Mfg. Co., into all parts of the United States. The principal outlay being for the purpose of new and additional machinery, in the employment of traveling salesmen, in the liberal advertising of the products, in the payment of labor, in the purchase of raw materials for the manufacture of the products, and for the general expenses of conducting the business of the Centaur Novelty Mfg. Co.

2d. That the said William V. Tascher shall assign and set over to the Centaur Novelty Mfg. Co. the patent No. 406,837, which he now owns, and also that he will assign to the said Centaur Novelty Mfg. Co. any improvements upon the said patent for which patents may be secured. That the Centaur Novelty Mfg. Co. shall have exclusive right to manufacture and sell the goods that are produced and protected by the above mentioned patent, in all markets in the United States, and that the Centaur Novelty Mfg. Co. shall at no time be required to pay a royalty or tax upon the same, other than to pay the actual cost of securing the new patents.

3d. That the general management of the business shall be conducted by W. V. Tascher and G. W. Timerman, each to share the same and alike in all business matters, and each to receive a salary of one hundred dollars (\$100) per month, until other conditions are mutually agreed upon, and each is to devote his entire time and energies to the business of the Centaur Novelty Mfg. Co., unless otherwise mutually agreed upon.

4th. That the office and plant of the Centaur Novelty Mfg. Co. may be removed from its present quarters to any desirable city which may be mutually agreed upon, to be for the best interest of the above mentioned company, and the expense incurred in removing shall be paid by the above mentioned company.

5th. That the consideration of three hundred dollars above mentioned, is to apply upon the principal consideration

of five thousand dollars (\$5,000), and that the balance of \$4,700 shall be paid into the treasury of this above mentioned company by not later than December 1, 1895.

In witness whereof we have hereunto set our hands and seals this twenty-second day of October, 1895.

WILLIAM V. TASCHER, [SEAL.]
GEORGE W. TIMERMAN, [SEAL.]”

The bill herein filed by Timerman alleges the existence of the corporation; that \$5,000 was paid by the wife of Timerman and stock transferred—five shares to Timerman, ten thousand shares to the wife, twenty-four hundred and ninety-five shares to another man of the same name, whose relationship, if any, is not shown.

The offices and plant of the company were brought to Chicago and business was conducted by Tascher and Timerman until July 1, 1896, when Tascher turned Timerman out of the management and took exclusive control.

This bill is filed upon the theory that by the agreement between them, Tascher and Timerman were partners in the management of the company, and that to exclude Timerman is a violation of their agreement.

The bill contains much criticism upon the conduct of Tascher in the management of the business, and upon his capacity as such manager, but no charge of any fraud committed or intended by him against the corporation.

Now, the shares of this corporation are one dollar each, nominally, and were sold at the price of fifty cents each; so that Timerman has an interest in the corporation of which the utmost extent is five dollars.

Merely upon the ground that he is a stockholder, the stake he has is too trifling for a court of equity to take cognizance of the case. *Dunnom v. Thomsen*, 58 Ill. App. 390.

“It is the duty of the court, in order to prevent its time from being consumed in frivolous controversies, to the detriment of suitors who are entitled to its attention, to decline to entertain them, although the defendants make no specific objection on this ground, by demurrer or otherwise.” *Chapman v. Banker and Tradesman Co.*, 128 Mass. 478.

There is no allegation that any other stockholders are dissatisfied, and if they were, and joined as complainants, a court of equity is very loth to take upon itself the conduct of the affairs of a corporation. *Wheeler v. Pullman Iron and Steel Co.*, 43 Ill. App. 626, 143 Ill. 197.

We are not prepared to say what should be done if the stock of a corporation is equally divided between holders who are adverse to each other, so that officers can not be elected.

The claim for relief is put by the complainant upon the ground, quoting from his brief, that "The contract between Timerman and Tascher was in substance a partnership agreement. That was the essence of the contract, and the mere fact that the business was carried on under the form of a corporation was an unimportant detail, as far as this case is concerned. Timerman is entitled to the usual equitable relief accorded in cases where one partner, in violation of the partnership agreement, excludes the other from participation in the business. That relief is an accounting and a distribution of assets after paying debts—substantially the relief prayed in appellee's bill. A court of equity will not be prevented from granting that relief by the fact that the business is conducted under corporate forms, even if the incorporation be in a foreign State. Except when the rights of creditors are involved the shareholders own the corporation and its assets, and a court of equity would have no hesitation in dividing these assets among shareholders in the interest of justice and right."

But the bill does not show that the other stockholders ever knew that they were to be, much less ever assented to be, mere servants without interest, of Tascher and Timerman, and that their respective holdings of stock gave them no rights in the corporation.

For aught that appears, everybody holding stock, except Timerman, regards the corporation as a real entity, having its corporate actual existence, and themselves as having valuable interests in it as such corporation.

Against their will Timerman has no claim that the business of the corporation shall cease, and that, practically, it

shall be destroyed by depriving it of the means to prosecute its business.

The contract between Tascher and Timerman is not one which a court of equity will specifically enforce, and for any injury which Timerman has sustained, by a breach of it, a court of law is open to him. We express no opinion as to what may be done by amendments of the bill.

As the complainant had no standing in a court of equity, the order of the Circuit Court appointing a receiver, from which order this appeal was taken, was wrong, if it stood by itself; but fifteen days before that order was made, an injunction was allowed which in effect prevents Tascher from carrying on the business of the corporation, and from that order there is no appeal.

A receiver is therefore necessary unless the court below voluntarily retraces its steps, and the order appealed from is affirmed at appellant's costs.

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190 245

Michael J. Howard, Impleaded, etc., v. Charles L. Boyd.

1. *APPEAL—From an Order Dismissing a Cross-Bill.*—An order dismissing a cross-bill is but interlocutory and not appealable.

2. *SAME—Final Disposition of the Cause Below.*—A cause must be finally disposed of in the court below before either party can carry it to the Appellate Court and assign error in the record.

Bill, to remove clouds from title. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1896. Appeal dismissed. Opinion filed December 28, 1896.

THOMPSON, DELAMATER & CLARK, attorneys for appellant.

JENKINS & LOUGHRIDGE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court sus-

Howard v. Boyd.

taining a demurrer to, and dismissing for want of equity, the cross-bill and amended cross-bill of the appellant filed in a certain cause in chancery, wherein the appellee was complainant, and said appellant, and others, were defendants.

The cause upon the original bill remained undisposed of, and is still pending in the Circuit Court.

The order dismissing the cross-bills was but interlocutory, and was not appealable.

It is apparent, from an examination of it, that the original bill, which was exhibited in the Circuit Court for the purpose of having a certain lease and two certain quit-claim deeds of the leasehold estate declared null and void, set aside, delivered up and canceled, remains undisposed of in respect to all the material issues presented by it; and it may be added, without prejudice to the future litigation under the original bill, that at least some of the issues presented by the cross-bill may yet be litigated under the answer of the appellant to the original bill.

It is therefore manifest that to permit this appeal from the decree dismissing the cross-bill to stand for consideration upon its merits, would have no effect to settle all the rights of the parties that are involved in the litigation, and would permit the case to be considered, as has been said, by piecemeal, a practice not allowable, as has been often decided by our courts.

“A cause must be finally disposed of in the court below before either party can carry it to the Appellate Court and assign errors in the record.” *Sholty v. Sholty*, 140 Ill. 81; *Fleece v. Russell*, 13 Ill. 31; *Cunningham v. Loomis*, 17 Ill. 555; *French v. Bellows Falls Savings Institution* p. 179, this volume.

The appeal is dismissed.

67	574
68	430
67	574
168	586

West Chicago Street Railroad Company v. Augusta Krueger.

1. **ERRORS—*When Immaterial.***—When the only question is as to the amount of damages, errors which do not affect the question of damages are immaterial.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JAS. B. MCCracken and ALBERT M. CROSS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 13, 1893, the appellee was a single woman, aged twenty-five years, and a passenger upon the Milwaukee avenue line of cable cars of the appellant. Part of the construction of the road consists of manholes about—as the witness for the appellant testified—one hundred feet apart between the slot rail and the side rail, “used to clean out the cable.” Such holes have a movable cover of iron, variously described as from two to five feet long—the latter being probably nearest the fact.

She was standing in a crowded car, as were about a dozen others, holding on to a strap—the car going rapidly—when the cover and car came into collision, and the car stopped, throwing the standing passengers to the floor, and injuring the appellee.

In such a case the only question is as to the amount of damages, and any errors—if errors there were—which did not affect the damages, are immaterial. The damages awarded were \$1,125—a result which the appellant may well

Original Typewriter Circular Co. v. Buehler.

regard as a happy escape, when a young woman passenger claims damages for a personal injury resulting from a defect in the vehicle or track of the carrier.

The judgment is affirmed.

Original Typewriter Circular Co. v. Charles F. Buehler.

1. PRACTICE—*Verified Plea and Affidavit of Merits*.—Where the plaintiff in an action of assumpsit filed with his declaration an affidavit stating the amount due as provided by the statute, and the defendant filed a verified special plea without an affidavit of merits, a motion to strike the plea from the files because no affidavit of merits had been filed was properly sustained, and the plea having been stricken from the files, judgment was rightly entered for the plaintiff by default.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

This was an action in assumpsit by appellee to recover on a note for \$250. The plaintiff filed with his declaration an affidavit stating an amount due, etc., as provided by statute. A verified special plea without an affidavit of merits, was filed by the defendant. A motion was made to strike the plea from the files, because no affidavit of merits had been filed, the plea being simply sworn to. This motion was sustained, and the plea being stricken from the files, the default of the defendant was entered and judgment for the plaintiff.

JAMES M. CLEAVER, attorney for appellant.

JOHNSON & McDANNOLD, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant insists that the character of its plea is to be determined by its conclusion, and that it is in abatement.

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If this be so, yet appellant was required to file with its plea an affidavit of merits. *Truesdell v. Hunter*, 28 Ill. App. 292.

Not having done so, its plea was properly stricken from the files. *Filkins v. Byrne*, 72 Ill. 101.

The judgment of the Circuit Court is affirmed.

District Grand Lodge No. 4, O. K. S. B., v. Rosa Menken.

1. **MUTUAL BENEFIT ASSOCIATIONS—*Expulsion of Members.***—To prove the expulsion of a member of a mutual benefit association, an expulsion in compliance with the law of the association must be shown.

2. **SAME—*Insufficient Notice of Proceedings to Suspend Member.***—When the laws of a mutual benefit association required a notice that if the arrears of dues were not paid on or before the first regular meeting of the following month the member would stand suspended, and the notice given was to appear in the lodge hall at the meeting to pay, and that in case of non-appearance, such member would be suspended, the notice was held insufficient, as under the law such member might send the money on or before such meeting, but under the notice he must go there in person.

8. **INTEREST—*Mistakes in the Calculation of.***—The question as to whether interest was calculated without mistake must be raised in the court below. It can not be inquired into in the Appellate Court for the first time.

Assumpsit, on a certificate of a mutual benefit association. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

JESSE LOWENHAUPT and B. J. SAMUELS, attorneys for appellant; PHILIP W. FREY, of counsel.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The only question in this case is whether Morris Menken was, at the time of his death, a member of the appellant lodge.

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He was once a member, but the lodge claims that he had been suspended before his death.

The section of the constitution of the lodge relating to the question is:

“It shall be the duty of the secretary of each lodge to report at every regular meeting the name of any member who is thirty days in arrears for non-payment of dues and assessments. He shall thereupon notify such member in writing that if not paid on or before the first regular meeting of the following month, he shall stand suspended from all rights and privileges of the order without further notice or action upon the part of the lodge.”

One notice given was:

“Mr. M. Menken, Dear Sir and Brother: You are hereby notified to appear at our next regular meeting, May 3, 1891, in the lodge hall at 406-408 Milwaukee avenue, in the afternoon, at 2 P. M., to pay the arrearage of \$4.50. In case of not appearing you will be suspended from the lodge. In truth, love and justice,

A. B. WOLF, Secretary.”

May 3, 1891, no quorum of the lodge met, nor did Menken appear.

The secretary testified: “Immediately after the meeting in May, I notified Menken of his arrears of \$10.50, by mailing a letter to him like the one I sent him before, except that it was \$10.50 instead of \$4.50. It was addressed to the same address, and the envelope contained my return card. The letter was not returned to me.”

As to the first notice, the secretary testified: “The letter was dated April 7, 1891, and contained the seal of the lodge. I was secretary of the lodge at the time the letter was written. I sent the notice on the day of the meeting, the first Sunday in April or the day following. This notice was sent to Menken by mail. I put it in the mail box. I have my direction on each envelope. It says ‘If not called for return to A. B. Wolf, 130 Fullerton Avenue, City.’ I addressed the envelope containing the notice to ‘M. J. Menken, 17 Upton Street, City,’ which was Menken’s address at

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that time. I deposited the envelope containing the notice in the mail box opposite my home. The letter was never returned to me."

The brief of the appellant argues that it ought to have been permitted to prove a conversation between the secretary and Menken, in which the latter acknowledged receipt of notice; but the abstract shows that the question calling for such conversation was withdrawn by appellant, the attorney stating, "I think myself it is not competent."

The rule established by several cases in this State is, that to prove an expulsion of a member of a mutual benefit society, an expulsion in compliance with the law of the society must be shown. *High Court of Independent, etc., v. Zak*, 136 Ill. 185.

Here that law required a notice that if the arrears were "not paid on or before the first regular meeting of the following month," the member would "stand suspended." The notice to Menken was to appear in the lodge hall at that meeting to pay, and that "in case of not appearing you will be suspended."

Under the law he might send the money on or before the meeting; under the notice, he must go in person to the meeting.

So, waiving all question whether the proof of the contents and sending of the notice is sufficient, it is at least proved that no such notice as the law required was sent. *Mueller v. U. S. Mut. Acc.*, 51 Ill. App. 40, S. C., 151 Ill. 254, is in principle the same as this case. The appellee was the beneficiary in a certificate issued by the appellant to her husband, Morris Menken. She sued and obtained judgment, and that judgment is affirmed.

Whether the court calculated interest without mistake, was not made a question below, and can not be inquired into here for the first time.

Frank G. Logan et al. v. Dennis F. Sibley et al.

1. **ATTACHMENTS—*Plea Denying the Affidavit Amendable.***—A plea, under section 27, chapter 11, R. S., entitled “Attachments,” denying the affidavit upon which the attachment issued, is neither in name nor in effect a plea in abatement. In cases of original attachments it is a dilatory plea, but is amendable under the present law.

2. **SAME—*When they do Not Lie Against the Owners of Patent Rights.***—A patent is the intangible right to a monopoly of the patented device, covering the whole territory of the United States, and an attachment will not lie against such owner upon the grounds that he is about to remove the same from the State.

Attachment.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1898.

HAMLIN, SCOTT & LORD, attorneys for appellants.

CHARLES B. WOOD and HORACE S. OAKLEY, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants commenced this suit against Sibley, by attachment, and their first complaint is that the court permitted Sibley to amend his plea first put in under Sec. 27, Ch. 11, “Attachments,” denying the affidavit upon which the attachment issued. Before the present law of 1872, the plea was, in name and effect, a plea in abatement. R. S., 1845, Ch. 9, Sec. 8; *Eddy v. Brady*, 16 Ill. 306.

But under the law now in force, it is neither in name, nor in effect, a plea in abatement, though it is a dilatory plea in cases of original attachments, and therefore the plaintiff should always, if he wants speed, make his attachments in aid, under Sec. 31. *Schulenburg v. Farwell*, 84 Ill. 400.

Such a plea is, under the present law, amendable. *McFarland v. Claypool*, 128 Ill. 397, does not decide, but implies, that proposition.

The brief of the appellant states “the only clear asset”

Sibley "had in Illinois were these patents for improvements in grain machinery." If a patent is considered as the paper on which it is written, it may be carried about—removed; but considered as property, it is the intangible right to a monopoly of the patented device, covering the whole territory of the United States wherever the owner may be. An owner may make a fraudulent disposition of it, or may be about so to do, but the affidavit did not state either of those grounds. It was only upon allegations of removal of property from the State that the attachment was sued out, under the third and fourth clauses of Sec. 1 of the attachment act. The only property Sibley had having no location, no more than has the law under which the patents issued, he could not remove it, and therefore there was no ground for the attachment. The appellants took judgment for the debt due to them, and that was all that they were entitled to.

If any irregularities occurred during the proceedings in the Superior Court, the appellants were not injured and can not complain. *Dilworth v. Curts*, 139 Ill. 508; *Primley v. Shirk*, 163 Ibid. 389.

The judgment is affirmed.

Cornelius S. Richey, Adm'r, etc., of Wm. J. Turner, deceased, v. Hector M. Sinclair et al.

1. **MORTGAGE—*Must Show Who is the Creditor.***—A mortgage which does not name the mortgagee and which contains nothing to show who is the creditor, so that such lack may be supplied by reference, is void, and a recital that the mortgage is given to secure a note payable to the order of A, is not sufficient, as such a note may be the property of some other party.

2. **DEMURRERS—*What Questions Can be Raised by.***—A mortgage conveyed one acre of land in the northwest corner of block twenty-seven, etc.; the block was intersected by a road extending from its northwest to its southeast corner. *Held*, that the question whether the acre shall be partly in the road, or enough on each side to make an acre, can not be raised by demurrer.

Richey v. Sinclair.

Bill, to foreclose mortgage. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

BASSETT & BASSETT and J. EDWARDS FAY, attorneys for appellant.

H. T. & L. HELM, PARKER W. TEFFT and BOWEN W. SCHUMACHER, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It is not necessary for the purposes of this opinion, that it be shown how the parties are interested in the question to be decided.

This appeal is from a decree dismissing, upon demurrer, a bill filed to foreclose as a mortgage, an instrument, the operative words of which are as follows:

“This indenture, made this thirtieth day of May, in the year of our Lord one thousand eight hundred and seventy-nine, between John A. Van Pelt, of the city of Chicago, in the county of Cook and State of Illinois, of the first part, and, of the second part; whereas, the said party of the first part is justly indebted to the said party of the second part in the sum of one thousand dollars, secured to be paid by a certain promissory note, bearing even date herewith, payable six months after its date, at Aledo, Mercer County, Illinois, with interest at eight per cent per annum, to the order of William J. Turner.

Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned and also in consideration of the further sum of one dollar, to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, aliened and conveyed, and by these presents do grant, bargain, sell, remise, alien and convey unto the said party of the second part, his heirs and

assigns forever, all the following parcel of land situated in Cook county, Illinois: one acre ofl and of the northwest corner of block twenty-seven, in South Lawn, being a subdivision of the south half of section 8, T. 36, N., R. 14 east, in Cook county, aforesaid.

To have and to hold the same unto the said party of the second part, his heirs, assigns, etc. Provided always, that if the said party of the first part shall well and truly pay to the said party of the second part the aforesaid sum of money, in manner specified in the above mentioned promissory note, according to the true intent and meaning thereof, then these presents shall be void."

There is nothing to show who was the creditor, so that the lack of the name of the mortgagee may be supplied by reference. A note "to the order of William J. Turner" may be the property of Jones, Smith or Brown. In principle, this case is the same as *Disque v. Wright*, 49 Ia. 538.

There is, and was at the time when, etc., a road eighty feet wide running diagonally through the block from the northwest to the southeast, and the corners of the parallelogram which would be described by extending the sides of the block into the road, are near "the middle of the road."

But the question of whether the acre shall be partly in the road, or enough on each side to make an acre, can not be raised by demurrer.

If the appellant is entitled to any relief, his bill is not wholly without foundation.

Van Pelt is not made defendant, but that was not assigned as ground of demurrer. 1 Dan. Ch. 288.

As the instrument was on record, the appellees could hardly claim as purchasers without notice, but if they could, that defense could not be made by demurrer. Sugden, Ven. & Pur., Ch. 25.

The decree is affirmed, upon the single ground that the instrument is void, because there is no mortgage expressed or implied.

Park National Bank of Chicago v. William C. Niblack.

1. **BANKS—Effect of—Failure of.**—The failure of a bank and the seizure thereof by the comptroller of the currency ends the exercise of volition by the officers of the bank, stops the payment of checks, matures all demand notes held by the bank, and applies to the payment of such notes, all balances on the books of the bank, standing to the credit of the makers of the notes.

Assumpsit, on a check. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed. Opinion filed January 7, 1897.

WILLIAM BRACE and JOHN T. RICHARDS, attorneys for appellant; DEFREES, BRACE & RITTER, of counsel.

JAMES S. HARLAN and S. S. GREGORY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee had a check upon the appellant, drawn by parties who were indebted to the appellant upon demand notes in a much larger sum than then stood to their credit on the books of the appellant. Before the check was presented the appellant failed, and was taken possession of by the comptroller of the currency.

We are furnished with no argument or authorities as to the effect that the failure of the bank, and the seizure by the comptroller, had; but in our judgment, it ended the exercise of volition by the officers of the bank, stopped the payment of all checks, matured all demand notes held by the bank, and applied to the payment of such notes all balances on the books of the bank standing to the credit of the makers of the notes.

Whatever the officers of the bank, if solvent, might have done for the interest of the bank in relation to such notes and balances before the check was presented, was done by the law when the comptroller seized.

In three States, Illinois, Iowa and South Carolina, only, could this question arise under a system of which the common law is the basis, for it is only in those States that the holder of a check has a right of action upon it against the bank on which it is drawn, in case of a wrongful refusal to pay, and it is only in case of a wrongful refusal that he can sue.

It can not be contended that if the drawers of the check in suit had themselves presented it over the counter, the appellant, being solvent, might not have rightfully refused to pay, and would have been liable to no such action as was maintained in *Schaffner v. Ehrman*, 37 Ill. App. 340; S. C., 139 Ill. 109.

There is a good deal of discussion of somewhat similar questions, growing out of the failure of the Fidelity National Bank of Cincinnati in *Armstrong v. Warner*, 49 Ohio St. 376, and *King v. Armstrong*, 50 Ibid. 222.

The appellee had no claim upon the bank, and the judgment in his favor is reversed.

As he had no cause of action, the case is not remanded; a course we adopted as to errors of law in *C., M. & St. P. Ry. v. Hoyt*, 50 Ill. App. 583, sanctioned in the same case under the name of *Dunlap v. C., M. & St. P. Ry.*, 151 Ill. 409.

**Frank H. Hebard and Romaine Blakeslee, copartners,
etc., as Hebard & Blakeslee, v. Ella Riegel.**

1. **EXPRESSMEN—*Liability for Loss of Trunk—Notice of Contents.***—An expressman who transports a trunk, knowing it to be the luggage of a passenger, can not set up as a defense in a suit for the value of such trunk and its contents, where they correspond with the condition in life of the passenger, that some of the articles were not proper freight or baggage, because the circumstances give notice.

2. **SAME—*When Liable as Carrier of Baggage.***—Expressmen transporting the luggage of passengers from or to the depot of a carrier of passengers, are liable for injury to, or loss of such luggage, as carriers of baggage and not as carriers of freight. The circumstances notify them

Hebard v. Riegel.

that they are carrying the luggage of some one who has it as a passenger; they have the same notice that a passenger carrier has of the contents of the luggage, and their liability should be governed by the same rule.

8. EVIDENCE—*Owner May Swear to Value of Property.*—A person suing an expressman for the loss of a trunk and its contents may properly be allowed to testify to the value thereof, for a person is presumed to know the value of his own belongings.

Trespass on the Case, for the loss of a trunk and contents. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

NEWELL & HELDMAN and JAMES H. VAN HORN, attorneys for appellants.

CHARLES B. WOOD and HORACE S. OAKLEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

October 16, 1893, the appellee, with two companions, arrived in Chicago by the Pennsylvania railroad, and the checks for their luggage were delivered to the appellants, who were expressmen and delivered trunks from depots to hotels. They received the luggage, but did not deliver her trunk at the hotel designated.

The circumstances of the loss need not be stated; they do not indicate any moral delinquency by the appellants or their servants.

The court instructed the jury that the appellants were liable only "as carriers of freight and not of baggage." Whether that is a correct statement of the law applicable to carriers of passengers' luggage from the depot of one passenger carrier to that of another, or to or from such depots from or to hotels or private houses, may be doubted. The circumstances notify them that they are carrying the luggage of one who has it as such passenger. Having such notice, the expressman has the same notice that a passenger carrier has of the contents of the luggage, and his liability should be governed by the same rule. The only contest here, is, first, whether the contents of the trunk—being only

such as a lady having a fair share of the luxuries of life would carry when visiting the World's Fair—were such as the appellants would be responsible for; and, second, whether her testimony—she not being a dealer—was competent as to value.

Now on the first point—whether as carrier of freight or passenger luggage—the appellants had notice that it was the luggage of a passenger, that it was an even chance that the passenger was a lady, and thus they, in carrying her luggage, took the risk that she would carry luggage corresponding to her condition in life; and therefore they can not set up as a defense that some of the articles were not, in the absence of notice of the contents, proper freight or baggage, because the circumstances gave notice, and the contents were not of kind or value unusual. Hutchinson on Carriers, Sec. 61, n. 3.

Aside from the detail which the appellee gave of her experience, she is presumed to know the value of her own belongings. *Parmalee v. Raymond*, 43 Ill. App. 609.

There is no error, and the judgment is affirmed.

John Yore v. Mary Cook and the Estate of Ellen E. Yore, Deceased.

1. **PERSONAL PROPERTY—*What Does Not Change Character of.***—That a particular fund was derived from real estate as the result of the condemnation of, and payment for such real estate, does not affect its character when received in money by the original owner of the land, although the condemnation proceedings are still pending in the Supreme Court on appeal.

2. **SAME—*Distribution of, is According to Law of Deceased's Domicile.***—Personal property is distributed in accordance with the law of the testator's domicile.

3. **SAME—*What Does Not Change Character of.***—The fact that personal property is held in trust by a party living in this State for the benefit of a person living in another State does not change its character or *situs*, nor does the fact that it may be taxed here; it is still personal property descendible in accordance with the law of the domicile of the beneficial owner.

Yore v. Cook.

In Probate.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Circuit Court reversing an order of the Probate Court.

The point involved concerns the distribution of a certain asset of \$14,044 in the hands of the executor of the last will of Ellen E. Yore. The Probate Court found "that distribution of the assets of the estate of Ellen E. Yore, deceased, should be according to the statutes of the State of Illinois." This finding was reversed by the Circuit Court, it finding that the asset in question should be distributed in accordance with the laws of Michigan. The facts submitted to the court were as follows:

Ellen E. Yore died testate, without issue, July 3, 1893; John Yore, the appellant, is her surviving husband, and the domicile of both was, at the time of her death, in St. Joseph, Michigan. On April 6, 1893, the Circuit Court of Cook County, Illinois, rendered a judgment of condemnation in favor of the sanitary district of Chicago, and awarded the sum of \$16,802.50 to the owners of and persons interested in certain lands. The judgment also required the sanitary district to deposit this sum with the Globe National Bank of Chicago, for the benefit of the owners and persons interested, and subject at all times to the further order of the court. The appeal of the sanitary district was allowed therefrom on the filing of the usual appeal bond for \$1,000, which was duly filed. The judgment also permitted the district to take possession upon filing a bond of \$50,000.

On the 3d of May, 1893, the court, among other things, found that Ellen E. Yore was the owner in fee of certain of the lands described in the judgment of April 6, 1893, and it appearing to the court that she had filed her bond in court in the sum of \$10,000 to the sanitary district to protect it from loss in the event of a less sum being finally awarded Ellen E. Yore, the court ordered the Globe National Bank to pay her or her order the sum of \$16,802.50.

On April 26, 1893, Ellen E. Yore, being at the time in Chicago, signed a letter to Mr. E. B. McCagg, of Chicago, that "in consideration of his signing her bond" to enable the withdrawal of the said sum of \$16,802.50 from the bank, she agreed "that said money should be paid to you," Mr. McCagg, "to be held by you until said suit," the condemnation suit, "is finally determined, and all appeals or new trials entirely disposed of and finally settled, except that you may and are hereby authorized to pay out prior to such final determination such costs, expenses and attorney's fees as may be O-K'd by me in writing."

On May 3, 1893, while still in Chicago, she signed another letter to Mr. McCagg to invest the money held by him for her, in such securities, for such time, no longer than five years, in such amounts, upon such terms and at such rates as he might deem advisable, "you," Mr. McCagg, "to use your own discretion in all such investments and to hold all such securities to secure you against your liability upon said bond instead and in lieu of such of said money as you may invest."

In obedience to the order of May 3, 1893, the Globe National Bank delivered its cashier's check for said \$16,802.50 to Ellen E. Yore, payable to her order, which she indorsed to the order of E. B. McCagg, and was indorsed by Mr. McCagg "for deposit." At the same time Mr. McCagg gave Mrs. Yore a receipt, which receipt states, "which sum has been left with me in pursuance to the letters from you, dated April 28, 1893, and May 3, 1893." Mr. McCagg paid out of this amount three bills O-K'd by Mrs. Yore for attorney fees and expenses in the condemnation suit. After the death of Ellen E. Yore, and on the 17th day of October, 1893, in the Supreme Court of Illinois, Arthur B. Wells, in the name of the appellee, Ellen E. Yore, moved to dismiss the appeal of the sanitary district from the judgment of April 6, 1893, which motion was allowed and *procedendo* awarded. The last will and testament of Ellen E. Yore, of which said Shiel was appointed executor by the Probate Court of Cook County, Illinois, among other things, provided

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for the distribution of the moneys to be derived from said judgment of condemnation, and made the appellee, Mary Cook, the sole residuary legatee of Ellen E. Yore. The letters signed by Ellen E. Yore and addressed to E. B. McCagg were signed and delivered to him in Chicago, Ill., and the cashier's check of the Globe National Bank was indorsed and delivered by Ellen E. Yore to Mr. McCagg, in Chicago. The written requests to pay certain bills were signed by Mrs. Yore in Chicago. All the debts of her estate have been paid; more than two years have elapsed since the probate of the last will and testament of Ellen E. Yore in the Probate Court of Cook County, Illinois, and it is agreed by counsel that by the laws of the State of Michigan, a married woman has full and absolute control of her real and personal estate with power to contract, sell, transfer, mortgage, convey, devise and bequeath the same in the same manner and with the like effect as if she were unmarried. And that the laws of Michigan do not give the husband of a deceased wife a right to renounce the provisions of her last will and testament.

The appellant, John Yore, renounced all claim to the benefit of any devise in the last will of Ellen E. Yore, and in lieu of dower in her estate he elected to take under section 12 of the dower act of the laws of Illinois, and by reason of the lack of issue claims one-half of the personal estate as well as one-half of the real estate.

JOHN A. WATSON, attorney for appellant; LAWRENCE C. FYFE, of counsel.

ARTHUR B. WELLS, attorney for Mary Cook, appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

That the fund in question was derived from real estate, as the result of the condemnation of, and payment for, lands, does not affect its character when received in money by the deceased, and handed to Mr. McCagg.

Personal property is distributed in accordance with the law of the intestate's domicile. Kent's Commentaries, 12th Ed., Vol. 2, p. 430, 431; Russell v. Madden, 95 Ill. 485; Young v. Wittenmyre, 123 Ill. 303; Cooper v. Beers, 143 Ill. 25; Walker v. Welker, 55 Ill. App. 118.

Undoubtedly Mr. McCagg held this money in trust for its owner, Mrs. Yore, but such trust did not change its character or *situs*; it was still personal property belonging to Mrs. Yore, and therefore descendible in accordance with the law of her domicile.

Any personal property kept in this State, as horses, cows, furniture, promissory notes or money, may be, by the laws of this State, here taxed, perhaps under the present law is taxable here, but such taxation does not change the legal *situs* of such property, or affect the rule as to its distribution.

The will of Mrs. Yore, as to the character of her property, speaks as of the date of her decease; at that time the fund in question had been paid to her.

There is no evidence showing that Mr. McCagg kept the identical money, or evidence of money belonging to Mrs. Yore.

On the contrary, it appears that he paid out, at previous times, portions of the fund received by him in a cashier's check.

The subject of the *situs* and descent of personal property is so fully and ably discussed in Cooper v. Beers, 143 Ill. 25, that further comment is unnecessary.

The judgment of the Circuit Court is affirmed.

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James H. Gilbert, Sheriff, and The National Cash Register Company v. Fred H. Gere.

1. **CONDITIONAL SALES—Of Personal Property—Secret Liens.**—If possession of personal property is delivered under a contract, by which the receiver, on the performance by himself of a condition subsequent, shall have the right to become the owner thereof, and there is no com-

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pliance with the statute concerning chattel mortgages, the title of the party delivering such possession must yield to the claim of a creditor having a judgment and execution against the party having such possession.

Replevin.--Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and judgment here. Opinion filed January 7, 1897.

ALBERT H. MEADS, attorney for appellants.

HOLLETT & TINSMAN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This was an action of replevin by the appellee for goods and chattels by him claimed under a document as follows:

“ Agreement between Fred H. Gere and E. T. Bermel Co., both of the city of Chicago, Cook county, Illinois.

1st. Party of the first part has this day delivered to party of second part, one Meredith Soda Fountain in good order and condition, counters and other fixtures and utensils, as per schedule attached hereto.

2d. Party of the first part, for and in consideration of (\$1) one dollar in hand paid, receipt of which is hereby acknowledged, rents to party of the second part above described property for the term of five (5) calendar months from date, at the monthly rental of (\$25) twenty-five dollars, payable monthly in advance.

3d. First two months rent, amounting to (\$50) fifty dollars, payable on signing this contract, then at the rate mentioned in clause number two (2), on first of each month, commencing August 20, 1894.

4th. Party of first part agrees to sell the soda fountain and appurtenances as per schedule attached hereto to party of second part for (\$450) four hundred and fifty dollars, allowing party of second part full time of this agreement to accept said offer, in which event party of first part agrees to allow full amount of rent money paid by party of second part as part payment of said purchase price.

5th. Party of first part reserves the right to enter premises and take possession, and remove fountain and appurtenances in event of said party of second part defaulting in their payments or any portion of this agreement.

6th. At the expiration of this lease, should party of the second part decline to purchase property above named, they agree to return said property to party of first part in as good condition as at this date, barring natural wear and tear, at the store of party of second part.

Signed this 20th day of June, 1894.

E. T. BERMEL Co.,
by GEO. M. THOMPSON, President.
F. H. GERE."

August 1, 1894, the National Cash Register Company recovered, in the Circuit Court, a judgment against the E. T. Bermel Company for \$291 and costs, issued execution, and the sheriff levied it upon the property. The appellants are the sheriff and the Register Company.

There was testimony that, before the judgment was recovered, a collector of the Register Company was told that the property did not belong to the Bermel Company, but was not told to whom it did belong. After the levy the appellee demanded the property of the sheriff, and being refused, replevied.

The court below, trying the cause without a jury, sustained the replevin and entered judgment for the appellee, from which judgment is this appeal.

Nothing is involved in this case but the legal effect of the agreement set out above.

Is it a conditional sale, or a lease, as to judgment creditors of the Bermel Company?

Reading between the lines, as the Supreme Court did in *Murch v. Wright*, 46 Ill. 487, and *Lucas v. Campbell*, 88 Ill. 447, it is apparent that the intention of the appellee and the Bermel Company was, that the latter should acquire the property of the former, upon terms of payment which they had agreed upon. The lease in the second article, and the option in the fourth, might as well have limited the time to

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seventeen months as to five, and if the claim of the appellee is sustained, this case will be authority for so doing hereafter.

We understand that the law of this State is, that if possession of personal property is delivered under a contract, however disguised by words as to the real intention, by which the receiver, on the performance by him of a condition subsequent, may become the owner—has the right to do so—and there is no compliance with the statute concerning chattel mortgages, the title of the party delivering such possession must yield to the claim of a creditor having a judgment and execution, against the party having such possession.

Here the Bermel Company was not bound to buy, but the appellee was bound to sell, if the Bermel Company had been ready and willing, and offered to perform under article 4.

The property was therefore subject to an execution against that company.

The judgment is reversed, and judgment entered here for the appellants.

New England Piano Company v. Harry W. Maxwell.

1. **CONDITIONAL SALES—Of Personal Property—Secret Liens.**—If possession of personal property is delivered under a contract, by which the receiver, on the performance by him of a condition subsequent, shall have the right to become the owner thereof, and there is no compliance with the statute concerning chattel mortgages, the title of the party delivering such possession must yield to the claim of the creditor having a valid chattel mortgage on such property, made by the party in possession thereof.

Replevin, for a piano. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

GRIFFIN & BRADLEY, attorneys for appellant.

One in possession of personal property as bailee can not convey title to an innocent purchaser. *Bjork v. Bean*, 57 N. W. Rep. (Minn.) 657; *Hodderly v. Backus*, 55 N. W. Rep. (Minn.) 116; *Hutchinson v. Oswald*, 17 Bradw. 28; *Cox v. McGuire*, 26 Ill. App. 315; *Colton v. Wise*, 7 Ill. App. 396.

G. FRANK WHITE, attorney for appellee.

Contracts of sale whereby the seller undertakes to secretly retain title in himself, but to give an appearance of ownership in the purchaser, are void as to third parties. *Fifield v. Farmers Nat. Bank*, 47 Ill. App. 118.

A lease of personal property under an agreement that when a certain amount is paid the subject-matter of the lease is to become the property of lessee, and that past payments of rent are to count as payments on the purchase price, is a sale. *Murch v. Wright*, 46 Ill. 487, and cases cited.

Whatever the form of an agreement, if its purpose is to cover up a sale and preserve a lien in the vendors for the price of the goods, it is void as respects creditors. *Thompson v. Pratt*, 94 Penn. St.; *Fifield v. Farmers Nat. Bank*, 47 Ill. App. 118.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The question in this case is as to the validity of the claim of the appellant under a "Rental Contract," to the property described in it, as against the claim of the mortgagee without notice of the contract, under a chattel mortgage, about the regularity of which no question is made, given by the Lawrence named in the contract; which contract is as follows:

"RENTAL CONTRACT.

CHICAGO, Ill., Dec. 13, 1892.

This is to certify that I have this 13th day of December, 1892, hired and received of the New England Piano Co., 262 and 264 Wabash Ave., Chicago, Ill., one upright piano, style D, No. 52,477, makers' name Gilbert & Co., and valued at three hundred dollars.

New England Piano Co. v. Maxwell.

For the use or rent of said instrument, I agree to pay New England Piano Company or their legal representatives five dollars per month, and three dollars carting to be paid in advance before delivery of piano. I further agree to pay New England Piano Company or their legal representatives, in addition to rent and carting as herein specified..... dollars per month to cover insurance on piano during term of rental, said insurance moneys to be paid with each..... rent.

The instrument to be returned in as good condition as when received, reasonable and ordinary use and wear thereof excepted. In the city proper, carting to be paid one way before delivery, with first month rent; in all other places, carting to be paid both ways with first month rent. The instrument to be sent out in good tune and order; all subsequent tuning to be paid for at regular rates by me. All repairs to be made without charge, provided such repairs are not rendered necessary by my negligence or carelessness, in which event I am to pay for such repairs.

The instrument is not to be removed from my present address, as stated herein, and to which point the instrument is to be delivered, without the written consent of the said New England Piano Company, or their legal representatives. For any breach of this contract, or if the New England Piano Company, or their legal representatives, feel insecure, he, or they, may enter the premises whereon said piano may be, first paying, or tendering payment, of sum paid, if any, for time not then expired, and remove said piano therefrom without liability for trespass or otherwise. I hereby agree to hold the said New England Piano Company, or their legal representatives, free and clear from any and all claims for damages to premises which may occur during delivery or removal of said piano.

No agreement of sale of said instrument is implied hereby, nor shall a sale or purchase of said instrument be deemed valid without a written receipt from said New England Piano Company, or their legal representatives.

Should said renting continue longer than six months, in

the event of my then buying said instrument, as a measure of its depreciation by use, a sum equal to seven months' rental, and no more, shall be deducted from the valuation price above specified.

To all of the above, I hereby agree.

Residence, 402 Bowen Av.

Place of business.....

Signature, L. C. LAWRENCE."

Had Lawrence at any time, at least after the expiration of six months, been ready and willing and offered to pay for the piano, \$300, less what he had paid in multiples of \$5, his right to the piano under the last sentence of the contract would hardly admit of question, nor can it be reasonably doubted that the intention, to carry out which the contract was made, was that he should so pay, and become the owner of the piano. The observations made in *Gilbert v. Gere*, (p. 590, this volume,) are equally applicable to this case.

The mortgage creditor in this case stands on the same footing as the execution creditor in that. *McCormick v. Hadden*, 37 Ill. 370.

The judgment is affirmed.

Frank Hahn v. Fred Gates.

1. **AFFIDAVITS**—*Should State Facts, Not Conclusions*.—An affidavit upon which a motion to vacate a judgment is based should state facts and not conclusions. The process of reasoning by which a party reaches a conclusion is a matter of no consequence.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

JOSEPH GRANICK, attorney for appellant.

F. L. SALISBURY, attorney for appellee.

67	596
67	625
67	596
68	441
67	596
169s	299

67	596
104	113

Hahn v. Gates.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

April 21, 1896, in a case wherein the appellee was plaintiff, and the appellant was defendant, then pending in the Circuit Court, upon a declaration in assumpsit and plea of non-assumpsit, the appellee recovered judgment by a trial *ex parte*.

The appellant moved to vacate and set aside the judgment, which motion the court denied June 9, 1896, holding that it had no jurisdiction to entertain the motion.

Whether it had such jurisdiction or not, we need not consider, if the denial of the motion was right upon the merits. The Supreme Court hold that it is no ground for reversing a judgment of this court that "bad reasons" are given. *Penn. Co. v. Keane*, 143 Ill. 172.

And in *Potter v. Gronbeck*, 117 Ill. 404, the Supreme Court held that the process of reasoning by which I had reached a conclusion was "a matter of no consequence." And the principle is as applicable to a case where the court below under-estimates its own jurisdiction as to any other. *Campbell v. Powers*, 139 Ill. 128.

Now, the affidavit of the appellant upon which his motion was based, is stated in the abstract thus:

"Affidavit of Frank Hahn, defendant, who states that on the 1st day of August, 1895, he employed Joseph Granick, a practicing attorney, to attend certain cases for him then pending in the courts of this county. That he submitted a list of the cases in writing at said time to said Granick, among which were two or three cases which had been disposed of. He further states that he told his said attorney what cases had been disposed of, and that his attorney then and there marked the letter 'D' opposite the same.

That among said cases was the case of *Gates v. Hahn*. He further states that the suit of said Gates was for an alleged balance claimed to be due him on a settlement of an account, material and labor, alleged to have been furnished and performed, and money alleged to have been advanced by the plaintiff to affiant, and for wages alleged to be due the plaintiff.

He further states that for some time previous to the commencement of this suit, he and plaintiff were in business as contractors. That he is not indebted in any amount to plaintiff, and that there is due from the plaintiff in this cause to affiant, both upon a note and an open account, the sum of \$2,182.68, upon which nothing has been paid by plaintiff to affiant, as will appear by books of affiant, ready to be produced in court upon the hearing of this cause. He further states that he has a good and meritorious defense upon the merits to the whole of plaintiff's demand, and that it will be a great hardship upon him if said judgment is allowed to stand.

He further states that he is not at present a resident of the city of Chicago, and that the first notice he had that a judgment had been entered against him in said cause, was when he received a telegram from his attorney to that effect, and that he immediately came to Chicago, and prays the court to set aside said judgment and place said cause on the calendar for hearing."

The affidavit of Granick corroborated that of the appellant as to what had happened between them.

This only shows negligence by the appellant.

What is the real state of accounts between the parties is not set out, only his own conclusions. *Treftz v. Stahl*, 46 Ill. App. 462; *Hitchcock v. Herzer*, 90 Ill. 543, and case next preceding it.

No sufficient cause to set aside the judgment was shown, and it is affirmed.

67	598
80	20
67	598
102	346

S. W. Packard v. The Chicago Title & Trust Company, assignee of H. B. Twyford and Co., Insolvent.

1. *LEASE—Creating a Lien for Rent—Chattel Mortgage.*—A lease which provides that the lessor shall have a valid and first lien upon all the property of the lessee as security for rent, is, in effect, a chattel mortgage, and unless acknowledged and recorded pursuant to the statute, does not affect the property of the lessee in the hands of an assignee for the benefit of creditors.

Packard v. Chicago Title & Trust Co.

2. *SAME—Providing Security for Rent.*—A lease which provides that the lessor shall have a lien upon the property of the lessee, as security for the rent, is, in effect, a chattel mortgage for a debt which may never accrue.

3. *APPELLATE COURT PRACTICE—Incomplete Record—Jurisdiction to Affirm.*—The want of a complete record goes to the jurisdiction of the court to reverse, but not to the jurisdiction to affirm.

Voluntary Assignment.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

S. W. PACKARD, attorney for appellant.

CHARLES H. RIPLEY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case is presented to us upon the assumption that H. B. Twyford & Company, a corporation, made, for the benefit of its creditors, an assignment to the appellee, and that the appellee was administering its assets under the direction of the County Court. The appellant claimed a priority of payment out of these assets, of rent which accrued under a lease from himself to Twyford & Company, which lease contained these provisions:

“It is expressly agreed between the parties hereto, that if default be made in the payment of the rent above reserved, or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the party of the second part, it shall be lawful for the party of the first part, or the legal representatives of said party, at any time thereafter, at the election of said first party or the legal representatives thereof, without notice, to declare said term ended, and to re-enter said demised premises, or any part thereof, either with or without process of law, and the said party of the second part, or any person or persons occupying the same, to expel, remove and put out, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice

to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants; and said party of the second part further covenants and agrees that said party of the first part, or the representatives or assigns of said party, shall have, at all times, the right to distrain for rent due, and shall have a valid and first lien upon all property of said party of the second part, whether exempt by law or not, as security for the payment of the rent herein reserved."

The particular property out of which priority was claimed, was held by the assignor when the lease was made, and passed to the possession of the assignee. The argument of the appellant now is devoted to showing that *Borden v. Crook*, 131 Ill. 68, and *First Nat. Bank v. Adam*, 138 Ill. 483, do not apply to a case where the lessee had the property when the lease was made. Those cases, however, treat such a provision as is quoted from the lease, as a chattel mortgage, which it is, in effect, and this court has held that unless acknowledged and recorded pursuant to the statute, such a mortgage does not affect the property in the hands of an assignee for the benefit of creditors. *First Nat. Bank v. Baker*, 62 Ill. App. 154. When that case got to the Supreme Court, it went off upon the insufficiency of the record. 161 Ill. 281.

The lease can not be held to have created a present lien for the rent now unpaid.

The term commenced April 1, 1894. The rent in question was the balance due in March, 1896, and was about three months' rent. Whether any rent would, under the lease, accrue in 1895 and 1896, was, when the lease was made, contingent upon the happening or non-happening of several events. *Wood v. Partridge*, 11 Mass. 487.

Thus the provision of the lease is not only in legal effect a chattel mortgage, but a chattel mortgage for a debt that might never accrue.

The only judgment which the appellant wants is one that will require the appellee to pay, and that he asks upon a record that shows no appeal bond (*Pickering v. Mizner*, 4

Chicago Paint & Wall Paper Co. v. Hollahan.

Gilm. 334, Leach v. People, 118 Ill. 157), and only portions, which the parties stipulated should be brought here, of the whole record.

That is not enough for us to reverse any judgment upon. Troy Laundry Mach. Co. v. Kelling, 157 Ill. 495; Moore v. Bolin, 5 Ill. App. 556; Reis v. Pitzele, 63 Ill. App. 47; Hill v. Hill, Ibid. 366.

The want of a complete record goes to the jurisdiction to reverse, but not to the jurisdiction to affirm. Cases above cited from 5 Ill. App. and 157 Ill.

The judgment is affirmed.

Chicago Paint and Wall Paper Co. v. Jesse L. Hollahan et al.

1. **WAIVER**—*Of Irregularities in Perfecting Appeals.*—An irregularity in failing to perfect an appeal from a justice of the peace to the Circuit Court until twenty-six days after the entry of the judgment by the justice, may be waived by the entry of a general appearance in the Circuit Court by the appellee.

Motion, to dismiss an appeal. Appeal from the Superior Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

December 16, 1895, the plaintiff below perfected its appeal to the Circuit Court of Cook County, from a judgment rendered by a justice of the peace against it on November 20, 1895, for possession of certain property, and \$10 damages and costs, in favor of appellees. January 2, 1896, being the December term of the Circuit Court, appellees entered their general appearance in that court. February 10, 1896, being the January term, appellees moved the Circuit Court to dismiss the appeal from the justice with statutory dam-

ages, for reasons appearing in the transcript. Whereupon the court ordered the appeal dismissed for want of jurisdiction, with statutory damages and *procedendo*, from which order this appeal is prosecuted.

The only ground of dismissal appearing from the transcript is that the judgment before the justice was rendered on November 20, 1895, and the appeal to the Circuit Court was not perfected until December 16th, twenty-six days later.

SAMUELS & SELIGMAN, attorneys for appellant.

No appearance for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellees having entered in the Circuit Court their general appearance, thereby waived all irregularities in the means by which that court acquired jurisdiction of the cause.

The trial in the Circuit Court was to be *de novo*, and the irregularity of failing to perfect the appeal until twenty-six days after the judgment by the justice, could be waived. *Mitchell v. Jacobs et al.*, 17 Ill. 235; *Randolph v. Emerick*, 13 Ill. 344; *Gallimore v. Dazey*, 12 Ill. 143.

The judgment of the Circuit Court is reversed and the cause remanded.

Siegel, Cooper & Co. v. Henry Schneck.

1. GARNISHMENT—*What Debts May be Reached by.*—A garnishing judgment creditor of several joint, who are also several judgment debtors, has all the rights that either one of such debtors has, and may maintain garnishment proceedings for a debt due to only one of such judgment debtors. *Lake Shore & M. S. Ry. Co. v. Scott*, 67 Ill. App. 92.

Garnishment.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

North Chicago Street R. R. Co. v. Leonard.

A. BINSWANGER, attorney for appellant.

CRATTY BROTHERS & JARVIS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case presents only the question, answered in the affirmative in *Lake Shore & Michigan Southern Ry. v. Scott* (p. 92, this volume), whether a judgment creditor of two jointly, may garnish the debtor of one of them.

It is enough now to refer to that case for the reasons for which the judgment appealed from is affirmed.

North Chicago Street Railroad Company v. Mary Leonard.

67	603
68	439
67	603
167	618

1. **NEW TRIALS—*Improper Remarks by Counsel.***—The court should, upon its own motion, see to it that arguments to the jury are kept within legitimate limits, and should not allow counsel to attempt to subvert justice by appeals to the sympathies and prejudices of a jury in trials where such feelings may be easily aroused; and it is the duty of the trial judge if he believes that any improper elements have been worked into the case by unfair and prejudicial appeals to the jury, to award a new trial, if for such prejudicial matter one be asked, although no objection was made to such matter during the trial.

2. **SAME—*Improper Remarks by Counsel—When Court of Appeal will Reverse on Account of.***—A court of review may set aside a verdict, where improper appeals were made to the jury, if a new trial for such reason was asked for and denied, and such denial was excepted to and assigned for error, but it must plainly appear that substantial injustice was done and that the trial court abused its discretion in refusing a new trial.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

EDGAR TERHUNE, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$3,750, entered upon a verdict for that amount, in an action brought by the appellee against the appellant to recover damages for an injury sustained by her as a passenger, caused by the sudden starting of one of appellant's cars, which had stopped for her to get aboard, while she was in the act of getting upon it.

The testimony of the appellee as to the manner of her getting hurt was not contradicted by any evidence offered in behalf of appellant, and the issue as to whether the injury was the result of negligence by the appellant, through its servants, was decided against the appellant, by the jury, and we may add, from the reading of the undisputed evidence on that point, was rightly so determined.

Of the questions presented by the assigned errors, but three are argued by appellant, viz., the refusal of the trial judge to grant a change of venue, the excessiveness of the verdict, and improper remarks by appellee's attorney in his argument to the jury.

The last two questions may be properly considered together.

The effectual, and perhaps the only practicable remedy in ordinary cases, is for the trial court to visit the penalty of a new trial upon counsel who attempt to subvert justice by appeals to the sympathies and prejudices of a jury in trials where such feelings may be easily aroused, and trial courts should not hesitate to use their authority in such regard. *Harms v. Stier*, (No. 6,574 this term,) where the latest expression of the Supreme Court upon the subject is quoted; *West Chicago St. R. R. Co. v. Groshon*, 51 Ill. App. 463.

And the court, upon its own motion, should see to it that arguments to the jury are kept within legitimate limits.

It is true that it does not appear that counsel for appellant did any more than, from time to time, interpose an objection to the alleged prejudicial remarks of the opposing counsel.

without calling the attention of the court to, or asking for any ruling concerning his objections; and that he only noted an "exception," in other instances, to the remarks of the counsel, instead of to a ruling by the court; but it is often a matter of extreme difficulty for counsel, whose cause is thought to be offended against on such occasions, to determine upon the risk of an interference and wrangle over such matters in the presence of the jury, and the remarks by Judge Lumpkin in *Berry v. The State*, 10 Ga. 511 (p. 522), are exceedingly pertinent. If, however, the trial judge does not interpose, as he properly may without being called upon, during the trial, it should, and doubtless will, always be his duty on a motion for a new trial, if he believes that any improper element has been worked into the case by unfair and prejudicial appeals to the jury, to award a new trial, if for such prejudicial matter one be asked.

Doubtless a reviewing court may set aside verdicts so obtained, by what is as much a subversion of justice as the suborning of a witness, although no ruling of the trial court was made upon the objection at the time it was interposed, if, as in this case, a new trial for such reason were asked for and was denied, and such denial was excepted to and assigned for error here, and if it can be seen from the record that material injury has resulted because of the conduct of counsel. But it must plainly so appear. The discretion of the trial judge in refusing a new trial for such a reason should not be viewed lightly. It is only where it is plain that substantial injustice has been done, and that the trial court has abused its discretion in refusing a new trial, that a court of review will reverse a judgment upon such a ground.

Unless, therefore, it be plain in this case that an excessive verdict was awarded as a result in whole or in part of unprofessional conduct by counsel engaged in the trial, the judgment should stand. Under the evidence there can be no question of the negligence of the appellant, by its servants, and if appellee were injured as severely and as permanently as there was evidence of, she should have substantial damages.

The physician who attended her testified that her hip bone was fractured in a complicated manner; that she suffered great pain; that one leg is shortened an inch and a quarter, and that "she is so lame that she has no use of the leg, and I think it is a permanent injury, and that she will not recover from it. She may have better use by and by."

Another physician, who examined her on the day of the trial, two and a half years after the accident, testified that, by measurement, he found a shortening of over one and a half inches in the leg, that there was a considerable wasting of the limb, as well as shortening of it, and that "the injury will not improve as it goes on; * * * she will never have any better use of the leg than she has now, and she now has very little." And both physicians testified to evidence of much pain still remaining.

Under such evidence, in connection with the testimony of others, we are not led to a conclusion that the recovery was increased over what it ought to be, because of anything that was said or done by her counsel upon the trial.

Concerning the assigned error because of the refusal of the court to grant a change of venue, there does not seem to be any valuable end to be served by reproducing the petition and affidavit upon which the application was made.

Upon a consideration of the whole of the record upon the subject, we are satisfied there was no error in refusing the change of venue.

The judgment of the Superior Court is therefore affirmed.

James H. Gilbert v. The National Cash Register Company.

1. CHATTEL MORTGAGE—*What is, Under the Statute.*—Any conveyance of personal property having the effect of a mortgage or lien upon such property, providing that the possession thereof shall remain with the grantor, acknowledged and recorded in accordance with the act relating to chattel mortgages, is, for the purposes of such act, to be deemed a chattel mortgage.

67	606
73	214
67	606
176s	288
67	606
89	163

Gilbert v. National Cash Register Co.

2. **SAME—***When an Order for Goods is, in Effect—Notice.*—An order upon a manufacturing company for a “Cash Register,” to be sold upon credit, stating the terms of such credit, and providing that the vendee shall retain the possession of the register until default in one or more payments, and that the title of the same shall remain in the company as security for the deferred payments, when accepted and acted upon by the company, has the effect, as between the company and the purchaser, of giving it a lien for the amount unpaid thereon, and is, in effect, when properly acknowledged and recorded, a chattel mortgage, and notice to all the world.

3. **SAME—***What may be the Subject of a Chattel Mortgage.*—One may make a valid mortgage of a thing in which he has at the time a potential interest; as, if he owned sheep, he may mortgage the wool to grow upon them; but a fisherman who owns a schooner and is about to proceed upon a fishing voyage can not mortgage the fish he expects to catch because he has no potential interest in them.

4. **ACKNOWLEDGMENTS—***Omission to State the Venue Immaterial.*—The omission to state the name of the county, in the certificate of acknowledgment of a chattel mortgage, in which such acknowledgment is taken, is immaterial when it is certain that the acknowledgment was taken before a justice of the peace in and for a town which the court judicially knows to be in the proper county.

5. **SHERIFFS—***Liability for Selling Mortgaged Property.*—A sheriff who sells personal property upon which there is a mortgage, and of which he has notice, will be liable to the mortgagee for the value of the same.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice GARY, dissenting. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

This suit was brought by appellee before a justice of the peace to recover from appellant the value of a cash register. Appellee, through its agent, took an order for a cash register from one W. H. Luther, which order was dated May 12, 1891, and is as follows:

“(Form N. 4)

CHICAGO, 5-12, 1891.

GENTLEMEN: Please ship to me at my place of business, No. 106 22d street, as soon as practicable, one of your No. 9 registers, as per your illustrated catalogue. Said register to be equipped with all the latest improvements. Cabinet to be Brass B., denominations of keys to be on Blank Key Indicator, ‘No Sale.’

"On the fulfillment of above, I agree to pay you \$175, viz., \$25 cash, and give notes for the balance, due monthly, in equal sums of \$15 each.

"The undersigned to retain possession of said register until default be made in one or more of said payments, or until you shall feel unsafe or insecure in the premises; in either of which cases, at your option, the whole of said sums shall immediately become due, and you shall be entitled to such possession. In the meantime the title of said register shall remain in you for the security of said payments, until the full amount is paid; and in case the undersigned shall default in one or more of said payments, the undersigned hereby agrees to forfeit to said The National Cash Register Company, as liquidated damages, all payments made on account of said register, and to at once restore to said company possession of said register.

"You to keep the register in repair for two years gratis.

"This contract covers all the agreements between the parties.

W. H. LUTHER. [SEAL.]

This order was signed May 12th; the register was thereafter built and delivered June 12th. June 29th the instrument was acknowledged, the certificate of acknowledgment being as follows:

"State of Illinois, }
——— County. } ss.

The mortgage was acknowledged before me by W. H. Luther and entered by me this 29th day of June, A. D. 1891.

Witness my hand and seal.

THOMAS BRADWELL, [SEAL.]

Justice of the Peace, Town of South Chicago."

June 30, 1891, this instrument was recorded in the recorder's office of Cook county, Illinois.

November 4, 1891, the cash register in question in this suit, with other property of Luther in his place of business on 22d street, in the city of Chicago, was levied upon by the sheriff, under an execution duly issued out of the Circuit Court of Cook County, upon a judgment recovered by one

Gilbert v. National Cash Register Co.

Matthews against said Luther, and later on, in November, 1891, the sheriff sold the property so levied upon, including the cash register, which brought \$50 at the sale.

Appellee contends that said instrument is embraced within the statute as to chattel mortgages, and was recordable under the statute relating thereto, and that by virtue of such record, appellant had notice of the lien of appellee, and having seized and sold the register, is liable to appellee for the value thereof.

The evidence shows that after the levy was made and prior to the day of sale, one Kelsey, representing appellee, called upon the deputy sheriff and informed him that there was a mortgage on the register. One Blood testified on behalf of appellee, that on the day of the sale he showed the deputy sheriff and Edelstein (the purchaser at the sheriff's sale), the aforesaid instrument. The deputy sheriff testified that the instrument was not produced or shown to him at any time, and that on the day of the sale Blood said to him that he (Blood) could not produce the mortgage because it was at appellee's office, at Dayton, Ohio.

January 15, 1892, a judgment was rendered by the justice of the peace, before whom the case was tried, in favor of appellant (defendant below), from which appellee appealed to the Circuit Court, where, by agreement of the parties, a jury was waived and the case tried by the court; the finding of the court being in favor of appellee, judgment was entered in favor of him, and against appellant, for \$175 and costs of suit, from which judgment this appeal is prosecuted.

PERRY A. HULL and ANSON E. MEANOR, attorneys for appellant.

ALBERT H. MEADS, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 1 of Chapter 95 of the Revised Statutes of Illinois, is as follows :

“1. That no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage.”

By virtue of the statute, any conveyance of personal property having the effect of a mortgage or lien upon personal property, providing, etc., acknowledged and recorded in accordance with the act, is, for the purposes of the act, “deemed a chattel mortgage.”

That the order of W. H. Luther did, when accepted and acted upon by the National Cash Register Co., in delivering to him the register, have the effect of a conveyance by such company to him of the personal property mentioned in said order, is manifest. It is also apparent that such order, acceptance and delivery had the effect, as between the company and Luther, of giving to it a lien upon the register for the amount unpaid thereon.

Any person knowing that this order had been complied with, would regard it as in effect amounting to a conveyance of the register to Luther, and reserving to the register company a lien on the property so conveyed.

Such being the case, if the order was acknowledged and recorded in accordance with the statute, the record became notice of the lien of the company.

We think the instrument was properly acknowledged and recorded. The justice in his certificate calls it a mortgage; the acknowledgment was written upon the instrument, and whether, technically, it was a mortgage, is immaterial.

The form of acknowledgment given in the statute does not contain a statement as to venue.

The omission of the name of the county for which the justice was such officer, and in which the acknowledgment was taken, is immaterial, as it is perfectly certain that the

acknowledgment was taken by a justice of the peace in and for the town of South Chicago, which we judicially know is in the county of Cook. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148.

Counsel for appellant insist that the mortgage was not properly introduced in evidence, because produced and offered at the taking of a deposition. The mortgage was identified by the witness; he was examined and cross-examined as to the same; it was properly attached to the deposition as a part thereof, presented to, and properly received and considered by the court before which the cause was tried.

As soon as the order had been accepted by the register company, a contract capable of enforcement was created. The contract contemplated that the register company should deliver a register of a certain pattern, and that thereafter Luther should pay therefor the sum of \$175; appellee retaining, until such payment was made, the title to said register "*as security*" for the deferred payments.

In fulfillment of the contract, the register company delivered the register to Luther, and thereupon at the same time, the lien of appellee came into effect; the words of the contract pledging to appellee the property as security, notwithstanding the possession thereof by Luther, became operative.

The case is not one of a pledge of after-acquired property, or of an article, not then in being, but of a thing, a complete right to which was obtained when the contract was accepted, which property, in accordance with the contract, was delivered to the mortgagor. Up to the time of delivery, appellee had, by possession, security for what was to be paid to it; so soon as the delivery took place, the written pledge took effect, which pledge, having the effect of a lien, and therefore by statute a chattel mortgage, was, by virtue of its acknowledgment and recording, notice to all the world. *Greenaway v. Fuller*, 47 Mich. 557; *Harkness v. Russell*, 118 U. S. 663; *Hooven v. Burdette*, 153 Ill. 679; *Newell v. Grant Locomotive Works*, 50 Ill. App. 611; *Ward v. Shaw*, 7 Wend. 404; *Benjamin on Sales*, Sec. 320.

One may make a valid mortgage of a thing in which he

has at the time a potential interest; as, if he owns sheep he may mortgage the wool to grow upon them; but a fisherman who owns a schooner and is about to proceed upon a fishing voyage, can not mortgage the fish he expects to catch, because, he has no potential interest in them. 3 Am. & Eng. Ency. of Law, 183; Case v. Stovall, 50 Miss. 396; Grantham v. Hawley, Hob. 132; Thrash v. Bennett, 57 Ala. 156; Low v. Pew, 108 Mass. 347.

The sheriff not only had constructive but actual notice of the mortgage. Prior to the sale, he was told of the mortgage; it was unnecessary to do more. Appellee need not have attended the sale, nor was he required there to protest against the same.

The property was sufficiently described in the mortgage. The contract showed that it was to be taken to "No. 102 22d street," and there it was found and seized by appellant.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE GARY, DISSENTING.

The instrument which Judge Waterman treats as within the statute concerning chattel mortgages, is evidence only of a conditional sale; void as to an execution creditor of the vendee. Van Duzor v. Allen, 90 Ill. 499.

To record it, without an acknowledgment, was an idle ceremony.

Unless it was such an instrument as the statute concerning chattel mortgages makes provision for being acknowledged, the acknowledgment was equally idle. The only instruments contemplated by the statute are such as transfer a right of property from the debtor to the creditor—if to secure the payment of money be the object, and such as retain a lien only for purchase money are not, either by general law or the statute, to be deemed chattel mortgages. There is a special objection to the acknowledgment here. It does not say "this mortgage," but "the mortgage."

Quite consistently with the language, the intention was to convey the information that there was a mortgage somewhere connected with the transaction.

I think the judgment should be reversed.

Estate of Everett B. Preston v. C. L. Smith.

1. **CONTRACTS—*For Personal Services—Performance of.***—Contracts for personal service which can only be performed during the lifetime of the party contracting are subject to the implied condition of his continuing to live and be in health to perform them, and are terminated by his death or incapacity from illness.

2. **SAME—*For Sales at a Valuation to be Fixed by Persons Named.***—Contracts for sale at a valuation price, to be fixed by persons named, are impliedly conditional upon those persons surviving and making the valuation, and are terminated by their death before doing so, the valuation stipulated for having thus become impossible.

Claim in Probate.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

This case originated in the Probate Court of Cook County, where the appellee herein filed his claim against the appellant estate, for the sum of \$6,820.10, based upon a certain contract.

Upon the hearing before that court, the claimant, the appellee herein, was allowed his claim to the extent of \$207.91, against the appellant estate as of Class 7; the court holding that the contract in question was a personal one, and terminated upon the death of Preston.

Appellee herein took an appeal to the Circuit Court of Cook County. The case coming on to be heard in the Circuit Court, was, by agreement of counsel, submitted to the court for trial, trial by jury therein being waived.

The contract upon which the claim is based is as follows:

“CHICAGO, Ill., Sept. 11th, '91.

This agreement entered into between C. L. Smith, of Cleveland, O., and E. B. Preston & Co., of Chicago, Ill.

From the date above mentioned the said C. L. Smith agrees to give said E. B. Preston & Co. the exclusive right of manufacturing and selling a certain improved hose attach-

ment and swivel, patented August 20, 1889, patent number 409,512, and that he has not disposed of any right or portion of right to any other person previous to this agreement.

E. B. Preston agrees to furnish C. L. Smith with what his wants may be of this hose attachment, of any size manufactured, at a margin of twenty per cent above cost, said cost to be agreed upon, and he shall retain the right to sell these goods at market price, agreed upon between him and said E. B. Preston & Co.

It is mutually agreed that E. B. Preston & Co. shall push the sale of this swivel by advertising, exhibiting and soliciting trade by their traveling salesmen or other employes; shall keep at all times in stock, such quantities as will supply the market for demand, and to use their best efforts to create a large demand and a heavy sale of this article.

Said E. B. Preston & Co. further agree that the royalty paid to said C. L. Smith shall equal at least four hundred and fifty dollars (\$450) per annum. In case they do not reach this amount, this agreement can be canceled by C. L. Smith, and a new one made that will be satisfactory to him.

The said E. B. Preston & Co. further agree to pay C. L. Smith, on or before the 15th of each month following the sales of the hydrant swivels, a royalty of fifty cents per dozen on all three-fourths hydrant swivels sold. If any larger size be manufactured hereafter, a price in royalty will be made that will be satisfactory.

Said E. B. Preston & Co. will furnish said C. L. Smith with statements of sales of this swivel, with sales of each size, and E. B. Preston & Co.'s books shall be open to C. L. Smith at any and all times covering sales of this swivel.

Signed this eleventh (11th) day of September, 1891.

E. B. PRESTON & Co.,

By C. E. JENKINS, Mgr.

C. L. SMITH."

Upon the trial of the cause, appellee herein filed in the Circuit Court as his bill of particulars, upon which he would rely upon the trial of said cause, the following:

"The above claimant, C. L. Smith, for greater particularity, states that in this action he relies upon the special guar-

Estate of Preston v. Smith.

anty of deceased defendant, Everett B. Preston, that the royalty paid to this claimant under the contract herein filed, shall equal at least four hundred and fifty dollars per annum; alleging that at the time of the filing of this claim two years' default of said guaranty had been made, and by reason of the death of the said Everett B. Preston, and by virtue of the statute, viz., section 67, of chapter 3, of the Revised Statute of Illinois, there is due to this claimant, under said contract, eleven years, at four hundred and fifty dollars per year, making a total claim of five thousand eight hundred and fifty dollars."

Upon the trial of the case, the court found in favor of the appellee, less an agreed set-off of five hundred and twenty-four dollars and forty-nine cents, on the basis stated in the bill of particulars, deducting, however, a rebate for interest from each year's payment.

The defendant estate, the appellant herein, insisted that the contract had been terminated by the following notice of cancellation:

"Chicago, Ill., Sept. 10, 1894.

C. L. Smith, Esq., Springfield, Ill.

DEAR SIR: We hereby notify you that we elect to and do hereby cancel a certain contract signed by you and E. B. Preston & Co., by C. E. Jenkins, manager, dated Chicago, Illinois, September 11, 1891, having reference to the manufacture and sale of a certain improved hose attachment and swivel, patented August 20, 1891, patent number 409,512, and that we will proceed no further under that contract. We cancel this contract because the patented article has proved to be unsalable, and the contract running for no definite time, we have the privilege, after the first year, of canceling the contract when we see fit.

We do not, by this letter, mean to admit any liability to you under this contract, except for royalties on the hose attachment and swivels actually sold by us thereunder. As to these royalties we are, and always have been, willing to account to you at any time.

Yours truly,

E. B. PRESTON & Co."

Upon receipt of this notice, appellee served upon E. B. Preston & Co., the following:

“Chicago, Sept. 17, 1894.

E. B. Preston & Co., care Flower, Smith & Musgrave, Chicago, Ill.

GENTLEMEN: I do not understand that you have the right to cancel, without my consent, a certain contract signed by your company and myself, dated Chicago, Illinois, September 11, 1891, and I hereby notify you that I shall adhere to that contract, and if you fail to perform your part of it, I shall hold you liable for all damages.

C. L. SMITH.”

Appellant insisted that as Everett B. Preston, who did business as E. B. Preston & Co., had, since the entering into said contract, and after serving the above notices, died, such death terminated said contract.

The finding of the court was for four hundred and fifty dollars per year for the remaining term of thirteen years, less interest.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

MCGLOSSON & BEITLER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A right to, in a certain contingency, cancel the contract, was reserved to appellee, while Preston had no such privilege. The attempt by Preston to bring the undertaking to an end was nugatory, and properly treated by appellee as such.

The agreement was a personal undertaking upon the part of Preston, which he could not transfer, and which did not, at his death, devolve upon his executors.

In effect, the contention of appellee is that the executors of E. B. Preston are bound for twelve years to continue “to furnish” C. L. Smith with what his wants may be of this hose attachment, of any size manufactured, at a margin

Estate of Preston v. Smith.

of twenty per cent above cost, said cost to be agreed upon, "he retaining" the right to sell these goods at market price, agreed upon between "him" and said executors; and that the said executors "shall push the sale of this swivel by advertising, exhibiting and soliciting trade by their traveling salesmen, or other employes; and shall keep at all times in stock such quantities as will supply the market for demand, and to use their best efforts to create a large demand and a heavy sale of this article."

In other words, that these executors are bound to continue for twelve years to carry on the business of the late E. B. Preston.

The contract under consideration contains no such compact. It is manifest that the parties contemplated the personal services of Mr. Preston, his endeavors, skill and effort, and not that of persons appointed to administer upon his estate.

The agreements mentioned, to be made as to cost and prices, were to be between appellee and Mr. Preston, not between his executors and "C. L. Smith."

Contracts for personal service which can only be performed during the lifetime of the party contracting, are subject to the implied condition of his continuing to live and to be in health to perform them, and are terminated by his death or incapacity from illness. Leake on Contracts, 1st Ed., 704; 5 Am. & Eng. Ency. of Law, 136; Pollock's Principles of Contract, 367; Bishop on Contracts, Sec. 600; Tasker v. Shepherd, 6 H. & N. 575; Geipel v. Smith, L. R., 7 Q. B. 404; Marvel v. Phillips, 162 Mass. 399; Howe Sewing Machine Co. v. Rosenstein, 24 Fed. Rep. 583; Taylor v. Caldwell, 3 B. & S. 826; Dickinson v. Callahan's Adm'rs, 19 Pa. St. 227; Robson v. Drummond, 2 B. & Ad. 303; Browne v. McDonald, 129 Mass. 66; Spalding v. Rosa, 71 N. Y. 40.

Contracts for sale at a valuation price, to be fixed by persons named, are impliedly conditional upon those persons surviving and making the valuation, and are terminated by their death before doing so, the valuation stipulated for, having thus become impossible. Leake on Contracts, 1st Ed. 639; Milnes v. Gery, 14 Ves. 400.

For only what was earned up to the time of the death of Mr. Preston, is appellee entitled to prove against his estate.

The judgment of the Circuit Court to such amount, being for the sum of \$207.91, is affirmed; and the residue of the judgment of the Circuit Court is reversed.

Appellant will recover costs in this court. Affirmed in part and reversed in part.

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67	622
67	618
170a	520

Chicago & Alton Railroad Company v. Patrick Maroney.

1. MASTER AND SERVANT—*Burden of Furnishing Safe Appliances.*—The burden of furnishing safe appliances is upon the master, and although the master is not liable for defects and dangers known to the servant, yet the servant may rely upon the master in such regard, and is not bound to investigate and test the fitness and safety of the appliance in the absence of notice that it is defective or unsafe.

2. FELLOW-SERVANTS—*Carpenters and Bricklayers.*—The carpenters who build a scaffold and the bricklayers who work upon it are not to be regarded as fellow-servants, in considering the question of the proper construction of the scaffold, when such carpenters are under a different foreman and the work is entirely disassociated.

3. DAMAGES—*When Not Excessive.*—What is an adequate compensation for personal injuries is often a question of great difficulty. Under the circumstances of this case a judgment for \$2,500 is not deemed to be excessive.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

JAMES N. BROWN and M. J. SCRAFFORD, attorneys for appellant.

WILLARD GENTLEMAN and EDWIN W. SIMS, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee, a brickmason, recovered a judgment for

C. & A. R. R. Co. v. Maroney.

\$2,500 against the appellant, for personal injuries received by him from the falling of a scaffold, upon which he, together with five other brickmasons and two helpers, had started to work on the morning of May 15, 1893, for the purpose of finishing the top of the brick wall of a round-house being erected by the appellant.

The particular scaffold upon which the gang of which appellee was one began work on the Monday morning in question, was constructed by carpenters after the brickmasons quit work at five o'clock on the previous Saturday afternoon or evening, and was about twenty feet high, and had never been worked on but five or ten minutes before it fell.

There was evidence that tended to show that the scaffold was defectively constructed, especially in that braces that should have been nailed under the foot-locks were omitted, and that there was defective construction in other respects.

At all events, the scaffold fell because of inherent weakness in construction or material, or because of a weakening of it by depredators between Saturday evening, when the carpenters put it up and left it, and Monday morning, when the masons began to use it.

Concerning the latter, the foreman in charge of the job testified that subsequent to the accident he examined the material of which the scaffold was composed, and found marks in three places that indicated to him that some depredator had, with a chisel or a bar, pried portions of it apart, so that when weighted it would fall, but he made no report of such examination to the appellant or any person to whom a report of such a fact should properly be made.

Considering that circumstance in connection with the inherent improbability of there being any certain detection of such evidences as he said he observed, upon lumber that had been previously used for other scaffolds, and had fallen in a mass with several men and a considerable quantity of brick and mortar, we think the jury might reasonably, as they evidently did, place but slight reliance upon the testimony of the witness.

The same material had been used in other scaffolds at different points in the building, and, previous to its having been taken down and put up again on Saturday before the accident, had always sustained the weight put upon it. We must therefore conclude, as the jury doubtless did, that the carpenters in their haste to get away on Saturday evening, of which there was some evidence, neglected to properly construct it, and that as a consequence it fell. There is no evidence that appellee knew, or had reason to know, of the defective construction.

The burden of furnishing safe appliances is upon the master, and although the master is not liable for defects and dangers known to the servant, yet the servant may rely upon the master in such regard, and is not bound to investigate and test the fitness and safety of the appliance in the absence of notice that it is defective or unsafe. *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161.

There is some contention by the appellant that appellee and the carpenters who built the scaffold were fellow-servants, and for that reason the appellant is absolved from liability, but we fail to discern anything beyond bare plausibility in the argument.

The carpenters and the masons were under different foremen, and their work was entirely disassociated.

It was testified by the carpenter in charge of the scaffold construction, that the brickmasons never went upon the scaffolds until the carpenters' work was entirely completed.

True, it was requisite to the work of the masons that scaffolds should be provided, but their erection was scarcely more directly associated with the bricklaying, except in point of time, than was the manufacture of the lumber or nails out of which the scaffolds were built.

We need only refer to the case of *North Chicago Rolling Mill Company v. Johnson*, 114 Ill. 57, for the definition of who will be regarded as fellow-servants, and we will not extend that definition so far as to cover the case at bar.

No fault is found with the instructions given at the request of appellee, and we are satisfied that there was no

error in refusing to give the rejected ones offered by appellant.

Concerning the argued proposition that a servant is, equally with the master, chargeable with notice of defects, and that knowledge of defects must be brought home to the master, we will content ourselves with citing *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161; *Goldie v. Werner*, 50 Ill. App. 297; *Rice and B. M. Co. v. Paulsen*, 51 Ill. App. 123; *Wharton on Negligence* (2d Ed.), Sec. 211.

The remaining contention concerns the alleged excessiveness of the verdict, and has received much consideration.

The appellee was badly hurt temporarily, as may readily be seen from the evidence of the condition he was found in and extricated from, as testified to by entirely disinterested witnesses. As to the permanent disabilities under which appellee is claimed to suffer, the evidence is of a much less satisfactory character, being mainly confined, as it is, to the testimony of himself, his mother and sister, and consisting principally of what are known as subjective symptoms.

But upon the whole, we do not think we can state the rule in such regard more completely than was done in *Illinois Cent. R. R. Co. v. Cole*, 62 Ill. App. 480.

The judgment of the Superior Court must be affirmed.

Chicago & Alton Railroad Company v. John Scanlan.

67 621
170 106

1. **LIMITATIONS**—*Plea of, to Additional Counts.*—Where additional counts to a declaration in an action for personal injuries, filed after the statute of limitations has run against the original cause of action, are but different statements of how the injury occurred, a demurrer to a plea of the statute of limitations to such counts is properly overruled.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

JAMES N. BROWN, attorney for appellant.

WILLARD GENTLEMAN, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

1 This action was brought by appellant to recover for personal injuries received by him in the same accident, the falling of a scaffold, upon which he, as a brickmason, was at work, as that described in C. & A. R. R. Co. v. Maroney (p. 618, this volume).

This case was tried nearly two months before the Maroney case, and the evidence concerning the accident was substantially alike in both. The main additional circumstance developed on the trial of that case, was in the testimony of the foreman of the job concerning certain evidences discovered by him after the accident, of depredations committed on the scaffold between Saturday evening when it was put up; and Monday morning when it fell, of which circumstance he made no mention in his testimony in this case.

We refer, therefore, to our opinion in that case for the facts.

Upon the law, the only question argued in this case that was not in the Maroney case, arises from the sustaining of appellee's demurrer to appellant's plea of the statute of limitations interposed to the appellee's amended declaration filed more than two years after the injury.

The original declaration alleged the negligence of appellant to consist in the breaking and falling of the scaffold, "owing to its faulty and improper construction, and its then unsafe condition."

One count of the amended declaration alleged, as constituting the negligence of appellant, that it did, carelessly, negligently, etc., build and construct said scaffold, so that, etc., the same did break and fall, etc.

We see no difference between the two except in the matter of form. The cause of action was the injury. The different counts were but different statements of how it occurred, and the demurrer to the plea of the statute was

McMillen v. City of Chicago.

properly sustained. *Mitchell v. Milholland*, 106 Ill. 175; *Illinois Cent. R. R. Co. v. Weiland*, p. 332, this volume)

The appellee recovered a verdict and judgment for \$3,500.

What we said in the *Maroney* case, *supra*, concerning the claimed excessiveness of damages, has equal application here, and need not be repeated.

The judgment of the Superior Court is therefore affirmed.

Jesse W. McMillen v. City of Chicago et al.

Same v. County of Cook et al.

1. *ASSIGNEES—Of Officer's Salaries—No Standing in a Court of Equity.*—The assignee of an officer's salary may sue at law if his claim is valid, but valid or invalid, he has no standing in a court of equity.

In equity.—Bills by an assignee of an officer's salary. Appeals from the Circuit Court of Cook County. In the first case the Hon. JOHN GIBBONS, Judge, presiding. In the second case the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 23, 1896.

D. A. HOLMES, attorney for appellant.

FRANK L. SHEPARD, assistant county attorney, WILLIAM G. BEALE, corporation counsel, BYRON BOYDEN, assistant corporation counsel, attorneys for appellees; ROBERT S. ILES, county attorney, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In these cases the appellant filed bills to recover, in the one case from the city, salaries of policemen and firemen which he claimed by assignments from the policemen and firemen of wages due, or to become due to them, respectively; and in the other, the salaries of clerks in the office of the clerk of the Circuit Court, which he claimed under similar assignments.

We shall not go into the vexed question of public policy as affecting such assignments.

Good or bad, valid or invalid, the appellant has no standing in a court of equity. *City of Elgin v. Schoenberger*, 59 Ill. App. 384; 2 Am. and Eng. Ency. of Law, 2d Ed., 1095.

He may sue at law, in the name of the respective assignors, if his claims are valid. *Ibid*.

The decrees sustaining demurrers to, and dismissing the bills are affirmed.

Samuel P. Parmly v. J. Hamilton Farrar.

1. PRACTICE.—*Reasons for Giving Judgment, Immaterial.*—The reasons given by a judge in justification of a judgment pronounced by him are immaterial. The only question in such connection is, was there any substantial error committed by the court or was the judgment right according to the rules of law.

2. NEW TRIALS.—*Application of the Statute Restricting the Granting of.*—Section 27 of the practice act, providing that “no more than two new trials upon the same grounds shall be granted to the same party in the same cause,” does not apply to the granting of new trials for errors of law, but applies only so far as to restrain courts from reviewing the action of the jury on the facts after the concurrent number of verdicts specified by the statute have been found.

3. SAME.—*When a New Trial Should Not be Granted.*—When a jury, to whom the facts have been submitted, has three times determined herein the same way, the supervisory power of the judge should cease and the facts thus found should be conclusive.

4. PRACTICE.—*Special Findings and the General Verdict Must be Reconciled.*—Inconsistencies between the special findings and the general verdict must be irreconcilable in order that the special findings shall control, and all reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of the special findings. Unless the special findings are irreconcilable with the general verdict, looking only at the pleadings, verdict and findings, the general verdict prevails.

5. SAME.—*When Indebitatus Assumpsit Will Lie.*—When a contract is at an end, either by its own original terms or by the subsequent consent of the parties, or by the unjustifiable acts of the defendant, and nothing remains but to pay money, *indebitatus assumpsit* will lie, although the debt accrued under a special contract, and such special contract may be proper and necessary evidence in support of the action.

67	624
67	513
67	624
109	606
109	609
67	624
97	242
67	624
s105	396
s105	397
67	624
108	475
204s	41

Parmly v. Farrar.

Assumpsit, for commissions. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice GARY dissenting upon one point. Opinion filed December 28, 1896.

HECKMAN & ELSDON, attorneys for appellant.

GEORGE W. PLUMMER, WHARTON PLUMMER and W. I. CULVER, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$5,000, entered upon a verdict for that sum, in a suit brought by the appellee against the appellant, to recover commissions claimed to have been earned under an express oral contract for the sale of real estate.

There had been two previous trials, resulting in verdicts of three thousand dollars, and twenty-five hundred dollars, respectively, for the appellee. The trial judge permitted the following to be incorporated into the bill of exceptions, presumably, for the purpose of preserving his reasons for overruling the motion for a new trial:

“And the court in denying the said motion for a new trial, although stating that the preponderance of the evidence was with the defendant, based its refusal on the ground that two verdicts had already been rendered for the plaintiff and that there must be an end of litigation.”

The reasons that a judge gives in justification of a judgment pronounced by him, are immaterial. The only question in such connection is, was there any substantial error committed by the court, or, was the judgment right according to the rules of law? *Hahn v. Gates*, p. 596, this volume.

Our practice act, Sec. 57, concerning verdicts and new trials, provides that “no more than two new trials upon the same grounds shall be granted to the same party in the same cause,” etc.

Such a statutory provision may be said to be but declara-

tory of the principle embodied in the maxim "*Interest reipublicae ut sit finis litium*," and has always had a place in the statutes of this State, although previous to the revision of 1874, the words, "upon the same grounds," were not contained in it. Sec. 24, Chap. 83 (entitled "Practice"), Rev. Stat. 1845.

The Supreme Court has repeatedly held, and so proceeded as to impliedly hold, that the statute had reference to trials in *nisi prius* courts, but had no application to that court. *Wolbrecht v. Baumgarten*, 26 Ill. 291; *Stanberry v. Moore*, 56 Ill. App. 472; *Silsbe v. Lucas*, 53 Ill. 479; *Ill. Cent. R. R. Co. v. Patterson*, 93 Ill. 290.

In the last cited case there is an expression (on p. 292) which seems to indicate that the court intended to include the Appellate Courts of the State as being, in such regard, excluded from the operation of the statute. And the Appellate Court of the Fourth District, impliedly, so held. *Town of De Soto v. Buckles*, 40 Ill. App. 85.

But even as to *nisi prius* courts, it was very clearly stated in *Silsbe v. Lucas*, *supra*, that the statute does not apply to the granting of new trials for errors of law, but applies only so far as to restrain them from reviewing the action of the jury on the facts after the concurrent number of verdicts specified by the statute have been found.

While, therefore, we would not hesitate because, simply, of the statute, to reverse the judgment, we are not at liberty to do so in violation of law equally as binding upon us as a statute would be, if there were one.

The law that the determination of facts rests with the jury, and that their finding upon conflicting evidence will not be disturbed unless it is made to appear that passion, partiality or prejudice guided their verdict, is about as old as the right of jury trial itself. And such rule is applicable to a single trial.

The fact that three trials have been had, all resulting in favor of the same party, merely makes the rule more emphatic, but does not give rise to it.

When a jury to whom the facts have been submitted, has

“three times determined them the same way, the supervisory power of the judge should then cease, and the facts thus found should be conclusive.” *Silsbe v. Lucas, supra.*

We will not examine the facts, in the face of three verdicts against the appellant upon the same issue, which we assume was the case—the declaration consisting only of the common counts in *indebitatus assumpsit*, and the only plea being the general issue—further than to ascertain if there was evidence that tended fairly to support the verdict. And it would add nothing to the value of this opinion as a precedent, for us to recite the evidence that supported the appellee’s case.

There was clearly such testimony and documentary evidence as made out a case for the jury to pass upon. Whether there was such a preponderance of evidence in favor of the appellee as to leave us entirely satisfied with the verdict, is not a question we have to deal with on this record. There was enough evidence upon which a jury might do as was done, and unless some material error of law was committed, the judgment must stand.

The questions of law presented by the brief of appellant are neither many nor complex.

It is said that there was such language employed by counsel for appellee in his argument to the jury, as was calculated to arouse their prejudices against the appellant. We will not reproduce the remarks, nor say more concerning the point than to refer to what is said upon the subject in the opinion of this court in *Harms v. Steir*, p. 634, this volume.

It is next urged that the general verdict was contrary to the special findings. The inconsistency between special findings and the general verdict must be irreconcilable, in order that the special findings shall control; and all reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of the special findings. *C. & N. W. Ry. Co. v. Dunleavy*, 139 Ill. 132; *Independent Dryer Co. v. Livermore F. Co.*, 60 Ill. App. 390.

It is a rule, undisputed, that unless the finding is irreconcilable with the general verdict, looking only at the pleadings, verdict and finding, the general verdict prevails." Gall v. Beckstein, 66 Ill. App. 478.

The inconsistency between the special findings and the general verdict that appellant complains of is pointed out by his brief as arising because the jury, by one answer, found that the contract of agency which appellee had, fixed the price at which the property was to be sold at \$250,000; and that by another answer they found that appellee was not employed to make the sale without limitation as to the price for which it should be sold. And it is then argued that the evidence showed a sale at \$245,000.

This court can not look at the evidence to determine whether there be such an inconsistency between the special findings and the verdict as that the former must be held to control. Cases last above cited.

But if we are at liberty to do so, we would be required to hold that there was not, for any reason pointed out, any fatal inconsistency between the two. It does not at all follow that because there was a fixed price for the property when the contract of agency was entered into, or because appellee had no agency to sell the property without limitation as to price, that the appellant might not have availed himself of the purchaser procured by appellee, and himself sold the property to such purchaser at a price less than the terms of appellee's agency permitted him to do, whereby appellee would be, in law, entitled to recover his commissions the same as if he had personally concluded the sale.

No criticism is made of the instructions given in behalf of the appellee, but fault is found with the refusal to give three instructions asked by the appellant, only one of which requires to be noticed. It was sought by that instruction to have the jury told by the court that no recovery could be had under a declaration consisting of the common counts alone, unless there had been shown, by a preponderance of the evidence, a contract fully performed by the appellee.

While, as a matter of law, the proposition embodied in

Parmly v. Farrar.

the instruction was abstractly correct, and that no recovery upon a *quantum meruit* count could be had, where a special contract was relied upon, without showing performance of the contract so that nothing but payment therefor remained to be done, it did not state the whole proposition necessary to certain phases of the evidence concerning the wrongful prevention by the appellant of full performance by the appellee.

“When a contract is at an end, either by its own original terms or by the subsequent consent of the parties, or by the unjustifiable acts of the defendant, and nothing remains but to pay money, *indebitatus assumpsit* will lie, although the debt accrued under a special contract, and such special contract may be proper and necessary evidence in support of the action.” *Wolf v. Schlacks*, 67 Ill. App. 117.

There was evidence tending to show that appellant wrongfully took full performance of the contract out of the power of appellee, by himself completing a sale begun by appellee, and the instruction, to have been applicable to the case, should have included that element, in order to have made it error to refuse it.

We have examined the record with diligent care, and finding no substantial error of law, it becomes our duty to affirm the judgment, and it is so ordered.

MR. JUSTICE GARY.

I only wish to dissent from the doctrine of the cases cited by Judge Shepard, holding that the forbidding granting more than two new trials, applies only to the courts where the trials were had.

An Appellate Court can correct only errors committed by the court below, and how could the court below err in not doing what the statute forbids it to do?

MR. JUSTICE WATERMAN.

I am of the opinion that, while the fact that a court had or gave a poor reason for coming to a right conclusion is inconsequential, yet a statement of the reason actuating a

nisi prius court for making a judgment, may properly be made and prove useful.

In the present case, the fact that the court thought that the preponderance of the evidence was with the appellant, is not important; the determination as to the preponderance of the evidence is for the jury; and because of a mere difference of opinion as to such preponderance, the judge should not set aside a verdict. But if to the judge the verdict appear to be against the clear preponderance of the evidence, the result of passion or prejudice, he may properly interfere.

The trial judge is yet in this State an essential part of the tribunal engaged in ascertaining the truth as to disputed questions of fact. He takes part in the making of the record, and may make his opinions a portion thereof.

An Appellate Court, ordinarily, deals only with the record made below; yet the reasons actuating the Appellate Court in its final determination are sometimes important, and where such final determination is the result of finding the facts in controversy wholly or in part different from the finding of the court from which the cause was brought, it is the duty of the Appellate Court in its final order to recite the facts as found by it.

Max Scheldrup v. John V. Farwell Co. et al.

1. MALICIOUS PROSECUTION—*What Necessary to Recovery for.*—In an action for malicious prosecution it is necessary for the plaintiff to prove that the defendant, in the institution of the prosecution complained of, acted maliciously and without probable cause.

Trespass on the Case, for malicious prosecution. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

Max Scheldrup, the appellant, was, on the 15th day of January, 1894, arrested on the complaint and affidavit of

Travelers' Preferred Accident Ass'n v. McKinney.

William D. McIlvaine, the process being served and the appellant taken into custody by a constable with a warrant issued by David J. Lyon, justice of the peace, in and for Cook county, Illinois.

William B. McIlvaine was the credit man for John V. Farwell Company. The appellant was charged with having obtained goods under false pretenses from John V. Farwell Company. The justice discharged Scheldrup and this suit was brought against John V. Farwell Company and William D. McIlvaine for malicious prosecution and false imprisonment.

After the plaintiff's testimony was in, in the trial in the Superior Court, the judge directed the jury to bring in a verdict finding the defendant not guilty.

W. R. CHAMBERLAIN and WING, CHADBOURNE & LEACH, attorneys for appellant.

TENNEY, McCONNELL & COFFEEN, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In an action for malicious prosecution, it is necessary that the plaintiff should prove that the defendant, in the institution of the prosecution complained of, acted maliciously and without probable cause.

There was upon the trial below no evidence of a want of probable cause. The jury were therefore properly instructed to find the defendant not guilty.

The judgment of the Superior Court is affirmed.

Travelers' Preferred Accident Association v. C. S. McKinney.

1. VERDICTS—*When Conclusive.*—Where the evidence produced upon a trial is conflicting and irreconcilable the verdict of the jury will not be disturbed.

VOL. 67.] Travelers' Preferred Accident Ass'n v. McKinney.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

LOUIS SCHISLER and JOHN C. WALLIS, attorneys for appellant.

WILLIAMS, LINDEN, DEMPSEY & GOTT, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The main facts of this case are sufficiently stated in the opinion of the court in the same cause when it was previously before us, reported in 57 Ill. App. 141.

It is not here denied that a recovery for a small amount, equal to the weekly benefit of \$25 for a period of four days, according to one theory, or of three to four weeks, according to another theory, would have been proper, but it is insisted, upon a most critical analysis of the facts testified to, that a recovery so great as \$652.55, covering a period of disability of about half a year, is grossly excessive.

Whether so or not, turns wholly upon whether the appellee permitted himself to be cured as soon as he might.

Upon that question the evidence was of that conflicting and irreconcilable character which brings the case clearly within the rule that the verdict alone is conclusive of it.

Furthermore, this was the second trial of the cause, and resulted in a verdict for substantially the same amount as the first one, and it is not at all likely that another trial would bring a materially different result.

The evidence on both sides was wholly by depositions; there were no instructions offered or given; there is no question of law argued, and there is none in the case so far as we observe.

We must affirm the judgment.

Peterson v. Dugan.

William F. Peterson and Paul Radowitz v. John V. Dugan.

1. **BILL OF EXCEPTIONS—*What Does Not Constitute.***—In a roll of papers certified by a circuit clerk upon the back of a copy of an affidavit was a date and the word “approved,” followed by the signature and seal of a judge of the Circuit Court, and upon the back of the assignment of errors were the words “presented in open court the 22d of September, 1896,” followed by the signature and seal of the judge. *Held* that the papers so marked did not constitute a bill of exceptions.

Motion, to set aside judgment by default. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at October term, 1896. Affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

This is an appeal from an order denying a motion to vacate a judgment by confession, and allow the appellant Peterson to come in and plead to the *narr.* filed in the case.

Judgment by confession was entered December 19, 1895, against appellant, for \$300.25 and \$13 costs.

D. T. DUNCOMBE, attorney for appellants.

HENRY M. SHABAD, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

There is in this case no bill of exceptions. Neither the affidavits nor the copies of the same presented to the court below are before this court.

In the roll certified by the clerk, upon the back of what seems to be a copy of an affidavit, we find the following, in figures: A date, whether the 24th or 25th of “Sep., ’96,” we are unable to determine, the word “approved,” followed by the signature and seal of a judge of the Circuit Court.

This paper appears to have been filed in the Circuit Court September 24, 1896.

We also find upon the back of the assignment of errors, the words "Presented in open court the 22d of September, 1896," followed by the signature and seal of the judge.

Evidently some one in presenting what was designed for a bill of exceptions, has made a mistake.

The order of the Circuit Court refusing to set aside the judgment, is affirmed.

Henry Harms v. Caroline Steir.

1. APPELLATE COURT PRACTICE—*Improper Remarks by Counsel—When Ground for Reversal.*—This court will not reverse a judgment on account of improper remarks by counsel, unless it is plain that justice was in some way subverted or defeated thereby, but will in most instances rely upon the trial judge to protect against any injurious consequences from the indiscretion and over-zeal of counsel.

Trespass, for breaking into a dwelling house. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 14, 1896.

GAGE & DEMING, attorneys for appellant.

OLIVER & MCARTNEY and SIMMONS & WINSTON, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of \$2,000 recovered in an action of trespass brought by appellee against appellant.

The appellant urges three grounds for a reversal of the judgment.

First. That the verdict is not sustained by the evidence.

Second. Improper remarks by appellee's counsel.

Third. Excessiveness of the verdict and judgment.

67	634
67	340
67	604
67	627
67	634
68	458

Harms v. Steir.

Concerning the first ground: There were eight witnesses on each side who testified, and it may be truly said that there is no possibility of reconciling much of the evidence, *pro* and *con*.

In such cases an appellate tribunal can not, with safety, substitute its judgment of the truthfulness of the testimony of one set of witnesses and the untruthfulness of another, for that of the jury and trial judge, who saw and heard the witnesses as they testified. The law is, that in cases of irreconcilable conflict of testimony the verdict must stand.

Upon the second ground: That of improper remarks by appellee's counsel made to the jury, and to the court in the presence of the jury.

There was no objection made, and consequently no ruling to which an exception could have been taken, to the first remark that is complained of, made in the opening speech to the jury, about one Brenzel and his wife having "either ran away, or had gone away before the policeman came, so they were not on the scene when the arrest was made." For the presumable purpose of ascertaining whether Brenzel was a party to the suit, the court interposed, at this point, with the remark, "Harms is the only party." To that remark of the court, counsel for appellant replied, "Suit has been dismissed as to the other defendants." And then the court remarked, "This case appears to have been tried once before." Whereupon counsel for appellee stated to the court the fact that the cause had been formerly tried before a different judge, and taken from the jury, which was followed by an appeal to this court, where the cause was remanded for another trial, which was the occasion of the cause being here for trial again.

To nothing that so occurred was any objection made or exception taken, and we are at a loss to understand why counsel should have incorporated into his brief the statement of such occurrence as constituting error.

To other subsequent remarks made while examining witnesses, and in the closing argument, objections were made, and ruled upon by the court, sometimes sustaining and other

times overruling them, but we are unable to see any error in any ruling that was unfavorable to appellant.

In the written reasons filed for a new trial, it was specifically urged that such remarks of counsel were improper, and we must assume that the trial court gave due consideration to the subject in deciding upon that motion.

Although with due deference to the exalted system of ethics which graces the profession of the law, we may regret that counsel did not omit most of the matters complained of, still we, sitting as a court of review, may not seize upon such things as a ground for reversing a judgment where it is not plain that justice has been in some way subverted or defeated by the practice. We must in most instances, like the present, rely confidently upon the trial judge to protect against any injurious consequences from the indiscretion and over-zeal of counsel in such respects.

Commenting upon this subject, our Supreme Court has, in the very recent case (opinion filed November 9, 1896) of *W. C. St. R. R. Co. v. Annis*, spoken most felicitously :

“No more delicate question for decision can arise than the propriety of the conduct of counsel in the trial of cases, and it is gratifying to know that the sense of professional propriety is generally such that courts are seldom called upon to do so. When, however, the necessity arises, trial courts should not hesitate to use their authority to restrain all efforts of attorneys to obtain verdicts by using unfair means, and making remarks outside of the evidence calculated only to arouse the prejudice and passions of the jury; and whenever such restraining influences do not effect the purpose, the fruits of such unprofessional conduct ought to be taken away by granting a new trial. It is, however, as held in the *Cotton* case, *supra*, a matter resting in the sound discretion of the trial judge to say, under all the circumstances of the case, and in view of the counter remarks which may be made, and the temper and character of the jury, whether a new trial should be granted or not; and unless it satisfactorily appears from the record that the trial court had abused its discretion in this regard, courts of review can not interfere.”

Brady v. Madden Bros.

As to the excessiveness of the recovery, but a few words need be said.

The law permits punitive damages to be awarded in cases of aggravated trespass, in order that the guilty party may be punished, and others deterred from similar acts.

We do not find in the record, evidence that would warrant a recovery of so large a sum by way of compensation, but we are not disposed to overturn the verdict which has been approved by the trial judge, merely because it partakes considerably of punishment.

It is no light matter for one to have his or her home intruded upon by trespassers, who, in the winter time, tear away part of the side and roof of the house, and break a large hole from the outside into a room where the occupant lies in bed sick; and when the person found to be responsible for such a trespass is proved to be worth a half million of dollars, and, therefore, able to pay without much sacrifice, he may not successfully complain that a verdict of \$2,000 is excessive.

The motion to tax against appellant the costs of the additional abstract, is denied. We have not found it to be necessary to a fair understanding of the record of the cause.

The judgment of the Circuit Court will be affirmed.

J. F. Brady and Edward J. McCarty v. Madden Bros.

1. **NEGOTIABLE PAPER—Accommodation Indorser—When Not Liable.**—In a suit against the drawer and indorser of a check, the plaintiffs, who were real estate agents, testified that the check was given as a deposit on a real estate contract, between the drawer of the check and a third person, and that the indorser had no interest in the transaction, having merely loaned his name for convenience; that this trade fell through, but that the drawer of the check was indebted to them on another transaction. *Held*, that plaintiffs had no claim on the check, and that the indorser was not liable.

2. **JUDGMENT—On a Joint Promise Must be Joint.**—In an action *ex contractu* on a joint promise, a judgment can not be rendered against one defendant only, but must go against all the defendants, or none.

Assumpsit, on the common counts, with special count on a check. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and judgment here. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

This is an appeal from a judgment for \$1,017, rendered July 2, 1896, in favor of appellees and against appellants. The declaration contained a special count under the statute permitting the drawer and indorser to be sued jointly, and the common counts. The special count was on a check made by appellant Brady, payable to appellant McCarty, and by him indorsed in blank and delivered.

In addition to the general issue, two special pleas were filed: First, that the check was simply an accommodation check. Second, that the check was never intended to be used. By stipulation, all defenses were to go in under the general issue, and all evidence to go in under the common counts. The case was tried by the court, the parties waiving a jury. The check was offered in evidence, and appellees proved that it was presented in due season for payment to the bank, and payment refused for want of funds.

The defendants testified that the check was loaned, merely as an accommodation check; the plaintiffs then testified that the check was given as a deposit on a real estate contract entered into between McCarty and one Johnson, McCarty's name being used by Brady, who was the real party, McCarty having no interest in the transaction; that this trade fell through; that Brady's property in Kansas City was contracted to be sold to Johnson for \$30,000, and that appellees were entitled to recover for commissions on such sale, Brady having refused to carry it out. Appellees testified that McCarty, as they knew all the while, had no interest in the transaction, having merely loaned the use of his name to Brady.

JOHNSON & McDANNOLD, attorneys for appellants.

EDWARD J. WALSH, attorney for appellees.

Newman v. Jacobson.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The check having been given as a deposit upon a real estate trade, nominally between McCarty and Johnson, but really between Brady and Johnson, the check was not made for the use of appellees, and they have no claim to it.

If appellees have any claim for commissions, it is against Brady alone, for commissions earned in effecting a sale of his Kansas City property; they have no claim against McCarty, for they had no dealings with McCarty, and do not pretend to have had; they state that his name was used by Brady, entirely for Brady's convenience. They were not misinformed, and did not sell, or try to sell, any property belonging to McCarty.

Such being the case, they were not, taking their statement as to the facts to be entirely true, entitled to recover against McCarty.

Nor were they, the action being *ex contractu* for a joint promise, entitled to recover against one defendant only; they could have a recovery against all the defendants or none. *United Workmen et al. v. Zuhlke*, 129 Ill. 298.

It is therefore unnecessary for us to discuss the conflicting and irreconcilable testimony given upon the trial.

The cause having been tried without a jury, the judgment of the Circuit Court is reversed, and a judgment will be here entered for appellants, upon a finding of facts.

Judgment reversed, and judgment for appellants here, with finding of facts.

Henry P. Newman v. August Jacobson.

67	639
70	371
67	639
75	347

1. APPELLATE COURT PRACTICE—*Abstracts*.—A party bringing a case to this court must furnish and file a complete abstract or abridgment of the record. The intention of the rule is to require a presentation in the abstract, in substance, of those parts of the record upon which error is assigned.

Debt for Rent.—Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

L. S. HODGES, attorney for appellant.

THORNTON & CHANCELLOR, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is one of the cases in which enforcement of rules is unaccompanied by regret.

The appellant had occupied rooms of the appellee for several months, refusing to pay rent for them. The case was tried without a jury. The brief of the appellant is wholly to show that the court erred in the finding and judgment for the appellee because of a partial eviction of the appellant by the appellee; yet the abstract does not show the amount of the finding or judgment; nor anything as to the pleadings, further than, "Declaration in debt for rent of certain premises." "Plea, eviction of defendant by plaintiff." "Replication to plea of eviction."

Whether it was debt for use and occupation—on a demise—or upon a covenant to pay rent, is left in the dark. Whether the eviction pleaded was actual or constructive—of the whole, or a part, of the premises, or of some easement or appurtenance, is also so left.

What replication was made to the plea, we are not informed.

Perhaps no evidence shown by the abstract related to the issue joined. The appellant asks us to decide that a plea of eviction was proved, without showing us what it alleged.

The defense is not one that awakens any sympathy, and without repeating, we adopt so much of the opinion in *Flaningham v. Hogue*, 59 Ill. App. 315, as is applicable to this case, and affirm the judgment.

James E. Cagney v. E. C. Sweet.

1. **INJUNCTIONS—*Relating to Party Walls.***—When a person has a right under a party wall agreement to carry the wall up higher, although it may shut off the view from the other party's windows and lessen the light coming thereto, he may do the same thing by the erection of a screen upon such wall, without entitling the other party to relief by injunction.

Bill, for injunction. Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

On April 23, 1895, appellant was the owner of lot 5, known as No. 615 West Monroe street, and appellee was the owner of lot 4, known as No. 613 West Monroe street. Lot 5 was vacant, and lot 4 was improved with a two-story brick building. The west wall of this building stood one-half on appellant's lot, as he claimed, but only four inches on the lot, as appellee claims.

On said date appellant was about to build on his lot, and called upon appellee, who referred him to his attorney, who drew a party-wall agreement, which was executed by the parties hereto.

Appellant contends that the whole of the west wall of appellee's building is a party wall, and appellee contends that only the south 16 3-12 feet is a party wall, and that the residue is not a party wall, claiming an easement from twenty years' user in this wall supported upon appellant's lot.

The party-wall agreement is as follows:

"Dated April 23, 1895. Between E. C. Sweet, the defendant, of first part, and Jas. E. Cagney, the complainant, of second part. First party owns lot 4, block 7, etc., known as 613 West Monroe street, Chicago.

Second party owns lot 5, block 7, etc., known as 615 West Monroe street, and adjoining said lot 4. Both parties desire a party wall be declared and erected between them, half to stand on lot of first party and the other half on lot of second party.

Now, therefore, etc., in consideration of \$1, etc., and the agreements, etc., of second party, first party grants to second party full liberty to join to and use as a party wall the south 16 3-12 feet of west wall of building, on said lot 4, with the privilege of increasing the height of the part of said wall hereby granted so that the same may coincide with the other parts of building which second party may erect on said lot 5.

And further grants to second party the privilege of erecting a party wall adjoining on the south of the building on lot 4, extending a distance of 6 6-12 feet; and further grants to second party the privilege of erecting a party wall on the north of said building on said lot 4, commencing 4 11-12 feet north of said building and extending a distance of 14 6-12 feet, the center of said walls to be the division line of said lots.

The said walls to be of good materials and workmanship and conform to building laws. The said walls not to project upon said lot 4 further than to coincide with east face of west wall of building on said lot 4, except in case of chimney flue. That said wall so built shall be and remain party walls.

First party may use said walls without compensation. Second party to keep walls in repair at his own expense until used by first party.

Second party grants to first party the privilege of opening windows in the north 21 4-12 feet of the west wall of building on said lot 4, with the further right of increasing the height of same west wall in conformity to any building that may be thereafter erected on said lot 4, and the further privilege of extending the north and west walls of said building on said lot 4, so that same may join on the east wall of the building to be erected by second party on lot 5.

Walls to be erected at cost of second party; second party to construct chimney flues at points designated by first party.

Second party to build up chimneys of first party to same height as those on buildings to be erected by second party.

Second party to paint walls of his building same color as building of first party."

Cagney v. Sweet.

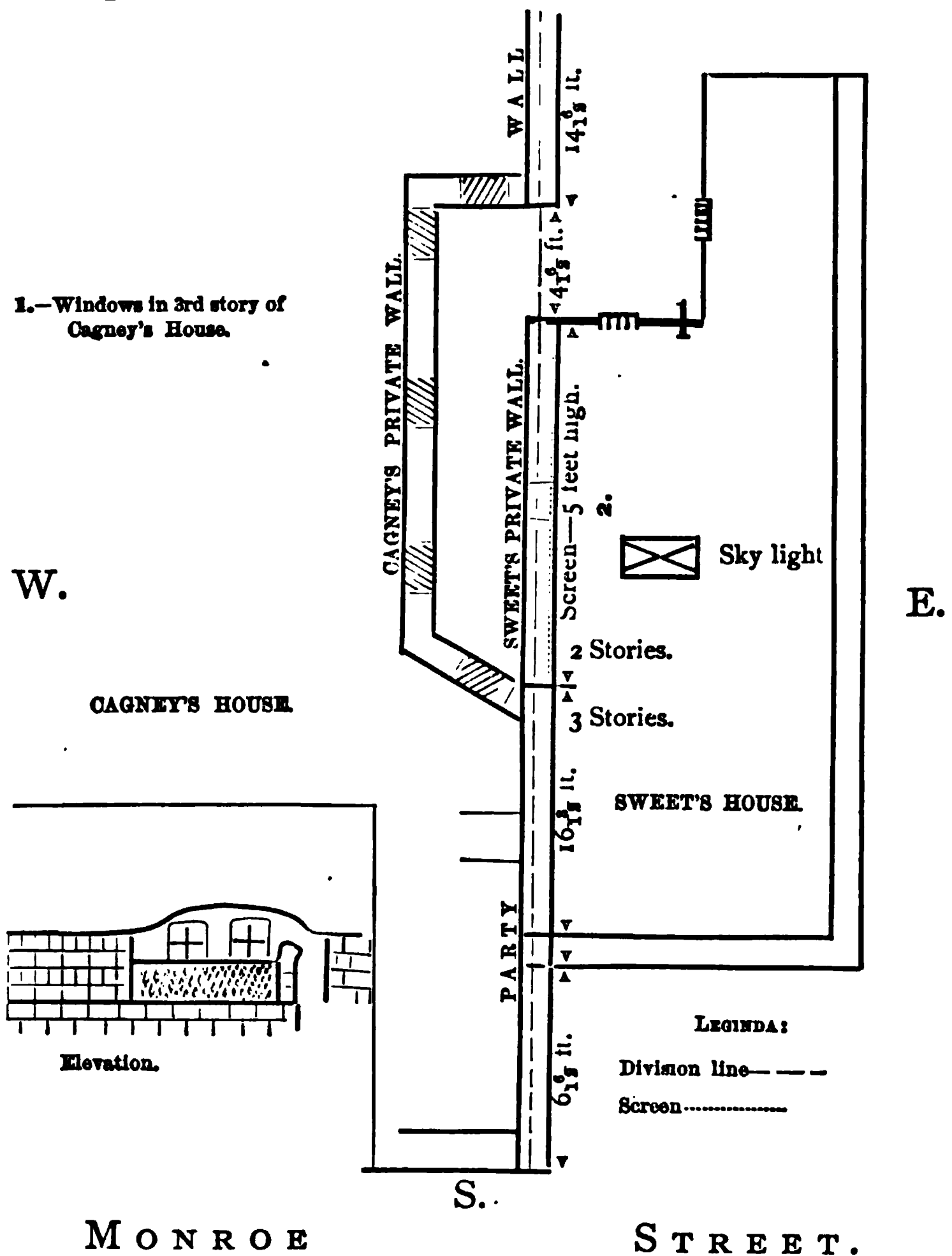
The following testimony was given:

“Mr. Warvelle: This contract does not cover the part marked blue in pencil on this plat.

Mr. White: No, sir; except to open windows in it, and increase its height to conform to Cagney’s house.

Mr. White: Mr. Warvelle, let me have your plat.”
(Plat handed to Mr. White.)

Plat produced and offered in evidence, and is in words and figures as follows, to wit:



“Mr. Warvelle: We have used the part of wall marked blue in pencil, for over twenty years, and claim an easement in the land on which it rests, for the support of our building. There is no party-wall contract of record relative to this wall, and none that I ever heard of.

Mr. White: That is probably correct, but there must have been some agreement of some kind, at some time, between the former owners.

Mr. Burns (the witness) resuming: Before suit was brought Sweet had built a fence or screen on top of the wall marked blue (indicating), five feet in height. This fence was fastened (indicating) to the north end of south party wall, described in party-wall agreement. Sweet built a sheet-iron screen and fastened it to the party wall.

Mr. Sweet: Since this suit was brought I have had the screen changed so that it is not supported by the party wall.”

The wall out of which this suit arose, was or was not a part of the party wall provided in the agreement. Upon this disputed wall appellee built a screen, thus shutting out the view over his property theretofore existing from windows in the premises of appellant near by. Appellant filed a bill asking for an injunction restraining appellee from maintaining such screen; the court below refused the injunction and dismissed the bill.

G. FRANK WHITE, attorney for appellant.

WARVELLE & CLITHERO, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Granting that the wall upon which the screen was built is a party wall, we do not think appellant is entitled to restrain the building of a screen thereon. Appellee had a right to carry the wall up higher, which would have, as effectually as the screen, shut off the view from appellee's windows and lessened the light coming thereto.

West Chicago Street Ry. Co. v. McCallum.

Appellee has not done, and is not threatening to do, any injury to the wall.

Appellant testifies that the screen darkens his windows. This, by carrying the wall higher, appellee had a right to do; that he has done it by the erection of a screen, does not entitle appellant to relief by way of injunction.

The decree of the Circuit Court is affirmed.

West Chicago Street Railway Company v. Mary B. McCallum.

67 645
169 240

1. STREET CARS—*Exercise of Care at Crossings*.—Street car companies should exercise great care at crossings, more especially when trains moving in opposite directions arrive at a crossing about the same time.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This was an action by Mary B. McCallum to recover damages for personal injuries, alleged to have been sustained by reason of the negligence of the West Chicago Street Railroad Company. The declaration consists of three counts, which allege:

First. That on the 22d day of June, 1893, while the plaintiff was riding, with due care, in a carriage, on California avenue, at the intersection of Madison street, one of the defendant's Madison street cable cars negligently struck the carriage, thereby throwing the plaintiff to the ground, causing the injuries complained of.

Second. That the defendant, at the intersection aforesaid, negligently operated its car, in this, that it did not slacken the speed or give warning of the approach of its grip-car at the said intersection, thereby causing the injuries complained of.

Third. That the defendant operated its grip-car at the said intersection at a dangerous rate of speed, thereby causing the injuries complained of.

At the trial, the jury found a verdict in favor of the plaintiff, and assessed her damages at \$2,000, and judgment having been entered upon this verdict, the defendant appeals.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

EDWARD E. PERLEY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee testified: "The accident occurred at 8 o'clock in the evening, on the corner of California avenue and Madison street; I was going across California avenue in my buggy, alone, from the south. I was driving north; on California avenue there was a two-seated rig standing waiting for the train to go east. I heard the signal as I drove up, and I stopped on the west side of this rig, and the train passed over from the west, and stopped on the east side of California avenue on Madison, and the other carriage started up, and I started up. My horse was along on the west side of the other carriage, and I looked east when I started, and the east bound train stopped on the east side of the street. We started across and I heard no bell sound at all. As my horse got on the north track—I presume the buggy stood about midway between the two tracks, I looked east. I saw the headlight before I heard the bell. I urged, slapped the horse on the back with the lines and urged him. She went across as rapidly as she could. I was almost across the track when the grip struck the buggy, breaking a spoke, turning it over and throwing me out. I was between this vehicle in front of me and to the east of me, and the west curb of California avenue. The top of my buggy was half up. I could see to the right or left of me as I sat in the buggy; there was nothing to obstruct my view, right or

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left. I could see west on Madison street from where I was sitting waiting for the east-bound grip. I suppose I could see almost half a block. I could not see east at all because the west-bound grip stopped on the east side. I couldn't see anything for the east-bound grip, until I got on the track, and saw the light of the west-bound grip. It was a very short time. I was driving from the point where I stopped for the east-bound grip to pass to the point where I first saw the headlight of the west-bound grip. Between those two points the horse trotted. When she started she immediately struck into a trot. At the time I first saw the headlight the buggy was going across the track the same as I was, and it was so far ahead of me that I couldn't see the headlight; it cleared the track and I didn't. I couldn't see behind the buggy that was in front of me at the time I first saw the light. I made an effort to see whether there was a west-bound grip. As I went upon the track I saw the east-bound train standing on the east side of California avenue; I didn't see anything else and I looked east. There was nothing opposite that grip to prevent my seeing the grip on Madison street except the grip on the east side of me. The carriage that was east of me was moving north, the same direction that I was going, and it went rapidly, as rapidly as I did."

Mr. Richardson testified as follows:

"Just before this accident I was on the grip-car traveling west. The buggy was moving north. I was on the front side of the grip, on the left hand side—south side. There were two sets of street car tracks in the street. The car was running on the north track, and Mr. Devoll was with me. The car was going west, east of California avenue when I first saw the buggy.

The car was about forty feet from California avenue when I first saw the buggy. The buggy was just coming up California avenue, and had just come in sight. I saw it the minute that it came in sight. What had prevented me seeing it before was, there was a building on the corner. The first thing I noticed there was an obstruction in front,

a wagon, I think, a heavy wagon, and the gripman commenced to ring his bell, and the wagon that was in front, as usual, kept going right along, and the car was slacking up, to the best of my judgment, right along, and the gripman kept on ringing his bell, and it did not appear to alter the course of the vehicle, and just as the buggy got across the street car track, or about to get across, it struck the hind-wheel, and I seen a lady go out over the dashboard. The wagon was traveling north. The car traveled about two or three feet after it struck the buggy. The bell on the grip-car was ringing from the time the buggy got in sight until the car stopped."

Four witnesses, none of whom were employes of the company, testified to the same effect.

Mr. Richardson also testified: "I did not take my eyes off that horse from the instant I first saw him coming into view on California avenue, south of the building line of Madison street, until the collision took place. I kept my eyes on the horse all the time, as I apprehended an accident. The horse was not running at the time of the accident, but was walking; he had walked from the time I first saw him until that accident. I didn't see the woman make any effort to hurry the horse, that was what attracted my attention. If she looked toward me, I didn't see her; I kept my eyes on the horse."

Had plaintiff looked east, it would seem that she would have seen the west-bound train, as several persons upon it saw her; her attention may have been absorbed by the east-bound train.

Street car companies should exercise great care at crossings, more especially when trains moving in opposite directions arrive at a crossing at about the same time. *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274.

The question of whether the plaintiff exercised ordinary care, and whether the defendant was negligent, was fairly submitted to the jury, under evidence such that a majority of the court are of the opinion we ought not to interfere with the judgment of the court below.

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While not approving of the phraseology of the first and third instructions given for the plaintiff, we find in neither any such error as we think worked any harm to the defendant.

The judgment of the Superior Court is affirmed.

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1. RAILROAD COMPANIES—*Implied Invitations to Cross Their Tracks.*—The stopping of a passenger train for the purpose of taking on or letting off passengers is an implied invitation to people to pass over such tracks as are necessary in order to get on or off of such train, but the invitation is only to persons who have a desire to do one of these things and is not an invitation to people whose only object in crossing such tracks is to do that with which the railroad company has no connection.

2. SAME—*When Persons Are Not Acting under an Invitation in Crossing Tracks.*—If a person, in going to a railroad station house for the purpose of sending a message from a telegraph office kept there, steps upon the premises of the company at a place designated by it as a crossing for such purpose, such person is acting under an invitation to cross; but not so if such person is going, not to the telegraph office, but to meet the operator while on his way to his place of business.

3. ORDINARY CARE—*What is Not an Exercise of.*—A person standing close to a railway station at which two passenger trains have just arrived, and near to which a freight train apparently about to pass the station is standing, and who suddenly steps onto the track along which he knows the freight train will pass, is not in the exercise of ordinary care for his personal safety.

4. LICENSE—*To Cross Tracks Imposes no Obligation.*—A mere naked license or permission to pass over the tracks of a railroad company, will not create a duty or impose an obligation on the part of the company to provide against the danger of accidents.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 7, 1897.

SIDNEY F. ANDREWS, attorney for appellant; JAMES FENTRESS, of counsel.

ROSENTHAL, KURZ & HIRSCHL, and S. S. PAGE, attorneys for appellee; ANDREW J. HIRSCHL, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an action by Miss Elvira James, to recover damages from the defendant, the Illinois Central Railroad Company, for alleged personal injuries received from being struck by a locomotive engine belonging to the defendant, and operated by its servants, while she was crossing its track in the city of Chicago, at or near a station called Grand Crossing.

The night previous to the accident, appellee remained with her sister at a hotel known as the "Kemp House." Upon the following morning she left the hotel, intending to go to the station house of the Illinois Central Railroad for the purpose of sending thence a telegraph message. Leaving the hotel at about 6:30, she started to walk down the walk that led to a walk that ran parallel with the Fort Wayne tracks.

While thus walking, appellee remembered that Mr. Easley, the telegraph operator, would not be at the station quite so early, so she thought she would cross the Illinois Central railroad tracks, walk westward, and meet him, as he was accustomed to come that way. She says that she went along the walk that ran parallel with the Fort Wayne tracks until she came within three or four feet of the Illinois Central tracks; that on nearing these, she noticed a passenger train at the depot, letting off and taking on passengers, and she thought that it would not be prudent for her to undertake to cross appellant's tracks before that train would leave the depot, so she stopped there, as she thinks, about a minute; that there was then a freight train standing south of 76th street, and a train coming from the south approaching the crossing, and also a passenger train on the farthest track west of the depot, and she, appellee, thought she had better wait, and when this train—that is, the passenger train—started to leave the depot, she started to move toward the

tracks, and that just as she stepped on the rail of the second track, a freight train approached her, and that is all she can remember; that before she was struck by the freight train, she saw it south of 76th street; that it was then standing still.

It appears that as she stood waiting to cross, there was one suburban train going north on appellant's tracks, and another suburban train of appellant's going south; that the freight train by which she was struck passed along between the depot and the suburban passenger train, which was unloading passengers on the third track from the place where appellee stood.

The freight train which struck appellee was moving at the time, about six miles per hour. Proceeding westward, appellee, as soon as the passenger train going south had passed, stepped onto the track along which the freight train was going, when that train was only a few feet away. As she stepped out, the engineer of the freight train saw her, gave two or three short blasts upon the whistle, reversed his engine, and did all that he could to stop the train.

There seem to have been six or eight people standing alongside of appellee before she started to cross the track, two of whom, as the engine struck her, ran to her assistance, reaching and holding her from falling to the ground, notwithstanding which, she was so bruised and sprained as to be seriously and permanently injured.

Appellee testified that the place where she was standing and attempted to cross the Illinois Central tracks, was a little south of the tracks of the Pittsburgh & Fort Wayne; and where there was a plank walk which had for some time previous been used by people who desired to cross over the tracks of appellant.

Appellee introduced in evidence a dedication to the Town of Hyde Park, for street purposes, of the ground where this plank walk lay, and also an acceptance of such street by the authorities of the town, but did not show that the parties so attempting to dedicate were at any time the owners of the ground.

Appellant contended that the walk in question just south of the tracks of the Pittsburgh & Fort Wayne Road, was not within the limits of any street, but was upon lands belonging to it, appellant, and also insisted, and gave evidence tending to show, that the place where she was injured was between the tracks of the Pittsburgh & Fort Wayne Railroad and those of the Lake Shore & Michigan Southern Railroad; and the decided preponderance of the evidence in the case is, that the accident occurred at the place last mentioned. Whether the accident happened south of the tracks of the Pittsburgh & Fort Wayne Railroad, or between them and the tracks of the Lake Shore & Michigan Southern Railroad, appellant contends that in either case, it happened upon its private premises, and that the appellee was, when injured, a trespasser, she not having gone thereon by invitation, express or implied, of the company.

Appellee states that as she stood before attempting to cross the railway, there was a suburban train unloading and taking on passengers; that this train was going south, and was on the third track from where she stood; that another suburban train going north was on the fourth track from where she stood; that the locomotive of the train going south crossed the crossing first, and that going north soon followed. Appellee proceeds: "Of course I did not see that pass, because before that I was struck by the freight train. The freight train passed in—was going to pass in—between the depot and the passenger train."

It thus appears that appellee started to go over these tracks as soon as the suburban train going south had passed by, and before she had seen the suburban train going north go by.

Appellee has called our attention to the fact that in the opinion first written in this case, we fell into the error of thinking that one of the suburban trains passed between the freight train and the depot, and that appellee stepped out from behind this suburban train on to the track upon which the freight train was proceeding. The fact is, that as appellee stood, before attempting to cross the tracks, the

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track next to her was clear, and that on the second track from her she saw, at 76th street, a distance of from four to five hundred feet, a freight train standing, apparently about to proceed northward, that is, along the second track from and between her and the point to which she wished to go.

Appellee says that two juries have declared, and the Circuit Court has confirmed, "that appellee took ordinary observation of the surroundings, looked when she crossed 76th street, saw a train standing, went on up to the defendant's tracks, looked south again, saw the freight still standing, saw the suburban train coming from each direction, waited about a minute, intent upon an opportunity to be given her by these suburbans to let her pass, and as soon as the opportunity was given, started to cross."

Appellee contends that under the circumstances, she had a right to expect that a freight train would not be run in between the suburban trains and the depot, certainly not without warning and at a considerable speed; and hence it did not occur to her to again look before stepping upon the tracks, and that the engineer of the freight train, as he was proceeding northward, had he looked, would have seen her standing and about to cross. Doubtless the engineer of the freight train, had he looked, would have, and we have no doubt did, see her standing, but whether he would have thought that she was intending to cross the tracks, can not be known. It by no means follows that persons standing at a railroad station, looking at a crossing, are about to pass over. Whether, however, the engineer thought appellee was intending to cross or not, is immaterial; in any event he should have given proper signals, and the preponderance of the evidence is that he did. However this may be, the question under consideration is not alone as to the negligence of the appellant, but in regard, also, to the conduct of appellee.

Had appellee, for the purpose of taking or departing from one of appellant's passenger trains, gone upon its tracks at a place by it designated for such coming or going, she would have been there by invitation of appellant.

So too, if, in going to its station house for the purpose of sending a message from a telegraph office kept there, she had stepped upon the tracks of appellant at a place designated by it as a crossing for such purpose, she would have been acting under its invitation; but in going, not to the telegraph office, but to meet the operator while on his way to his place of business, she was doing that, and making use of appellant's premises in a way it had not, either expressly or impliedly, invited her to do.

A passenger train stopping for the purpose of taking on and letting off passengers, is an implied invitation to people to pass over such tracks as are necessary in order to get on or off such train; but the invitation is only to persons who have a desire to do one of these things, and is not an invitation to people whose only object in crossing is to do that with which the railroad company has no connection.

We regard it as immaterial whether appellee was injured just south of the tracks of the Pittsburgh & Fort Wayne road, or between such tracks and those of the Lake Shore & Michigan Southern, even though it be conceded that the first named place was within the limits of a public street. She was where she was, not by any invitation of appellant, yet where there was every opportunity for her to see the approaching freight train; while the preponderance of the evidence is, that the freight train, proceeding northward, was giving all the signals required by law and ordinarily made use of to warn people of the approach of a train.

It is doubtless the case that it must be here presumed the jury found that such signals were not given. Granting that this was the case, it then appears that appellee, while standing close by a railway station at which two passenger trains had just arrived, and near to which a freight train, apparently about to pass the station, stood, suddenly stepped onto the track along which she knew the freight train, as it ran northward, would pass.

Appellee had lived in the vicinity of this crossing for some time; she must have been familiar with the fact that at railway crossings there is, at the time when trains are

arriving and departing, much noise arising from the ringing of bells and the hissing of steam, and that it was very easy for her, under such circumstances, to fail to notice signals made by the freight train which was standing just south of 76th street, and evidently about to proceed northward. She must have been aware that if the freight train was proceeding northward, as she had reason to think might be the case, she ran great risk in stepping upon the track along which it might be proceeding.

It is quite likely that appellee thought of none of these things; that, intent upon her desire to meet the telegraph operator before he arrived at, and while on his way to his office, she did not fully realize how dangerous a thing she did. Her act, however, is to be judged, not by what was running in her mind, but by what she knew, and therefore had reason to expect; and so considered, it is apparent that she did not exercise ordinary care.

We do not think that either of the learned counsel for appellee, or the plaintiff herself, would, if they knew that the wife or sister of one of them, was about, at this crossing, to step upon appellant's tracks under similar circumstances, regard such act as otherwise than extremely perilous.

There is nothing to show that the acts of appellant's servants, or either of them, were in any way wanton or reckless. It does not appear that the place south of the tracks of the Pittsburgh & Fort Wayne road, where appellee says she attempted to cross, appellant had ever invited the public to use, or knew that the public were using such place as a railroad crossing.

The Supreme Court of this State in *L. S. & M. S. Ry. Co. v. Bodemer*, 139 Ill. 596, says:

"In cases where persons have traveled along a railroad right of way as a mere footpath, using it for their own convenience, and where there was no evidence of any assent of the railroad company thereto, except its non-interference with the practice, it has been held that such persons are to be regarded as wrong-doers and trespassers, and that a mere

naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *Blanchard v. L. S. & M. S. R. R. Co.*, 126 Ill. 416; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510. But in each of such cases it was conceded that the place where the injury occurred was upon the right of way of the railroad company, and that the party making use of such right of way, knew it to be the exclusive property of the railroad company for the purpose of running its trains."

In the present case it is not conceded that the injury to appellee occurred upon an exclusive right of way of the railroad company, but it was not shown that the injury took place within the limits of any right of way which the public had acquired either by dedication or use, and if it were, the fact would still remain that the conduct of appellee in stepping upon the track of appellant in the manner she did, was, and must have been known to her to be, if she stopped to think, perilous in the extreme.

Counsel urge that appellant was bound to know that she might be standing beside its track intending to cross; if this be granted, she was equally bound to know that the freight train she saw might proceed northward. As is insisted, her attention may have been absorbed so that she did not think of the freight train, or forgot it. Nevertheless, it was open to her view, and moving along a track over which she proposed to cross. This is not a case upon which reasonable men can doubt as to the dangerous conduct of appellee in this regard.

As to the claim that by user, the public had acquired a right to cross the tracks of appellant north of 67th street and south of the tracks of the Pittsburgh & Fort Wayne railroad, the remarks of the Supreme Court in *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416, are appropriate. It is there said :

"The fact that persons residing in the locality where the accident occurred had been in the habit of traveling upon the

right of way of the defendant and no measures had been taken to prevent it, did not change the relative rights or obligations of the deceased or the railroad company." See, also, *Wabash Ry. Co. v. Jones*, 45 N. E. Rep. 50.

The case is very different from what it would be had appellee been injured when about to take, or departing from, one of appellant's trains, or while on her way to its station for the purpose of transacting business it invited people to come there to do. In such case appellant would have owed to her a duty, which it did not under the circumstances. Had the jury considered the undisputed evidence in the case, it could not, under the instructions of the court, have returned a verdict for the plaintiff. It is quite likely that the jury did not understand such instructions; indeed, it is unfortunately the case, that under our system of written instructions, only as to the law, and the absence of any comment by the court upon the facts, jurors very frequently are unable to understand instructions given to them.

No one can fail to have sympathy for the plaintiff. The question is not, however, as to what sympathy should be bestowed upon her, but whether appellant shall be compelled to compensate her for injuries which she suffered by reason of her most obvious neglect to make use of ordinary care.

Counsel for appellee say that while they have no doubt the case appeals strongly to our sympathy, they ask for neither sympathy nor charity, but justice only—that is to say, that the law shall be administered without regard to persons; and counsel say that, "by the law of Illinois to-day, a person approaching a railway crossing and about to pass over the same, may be in the exercise of ordinary care, although he does not look, and although he does not listen to see whether trains are approaching." To this contention we can not agree; on the contrary, we think that every ordinarily prudent person does, whenever he approaches a railway crossing, look out for approaching trains, and that it is not an exercise of ordinary care to, when there is nothing to obstruct one's view, step in front of and so close

to a train proceeding at six miles an hour that he is knocked down by it; and while we agree with counsel that the question of ordinary care is one to be submitted to a jury, we do not assent to the proposition that whatever the circumstances, if the jury finds that the person injured was exercising ordinary care, the court is bound by such finding. It is the case, as appellee suggests, that a person may be slightly negligent, and nevertheless be still in the exercise of ordinary care; but we can not regard the conduct of appellee in stepping immediately in front of this freight train, as merely slight negligence, or as conduct which can be defined to be ordinary care. If the place where appellee attempted to cross was a regular crossing, her right undoubtedly was the equal of that of appellant. The question in such case would not be as to her right to go where she attempted to, but as to whether, under the circumstances, the exercise of such right at such a time was not negligence, and that of a high degree.

Counsel say, "It may be admitted that if plaintiff had looked south just before stepping on the track, she would have seen the train, and would have avoided it," and also say that she "looked south and saw the train still standing, saw the suburbans coming from each direction, waited about a minute, intent upon an opportunity being given her by these suburbans to let her pass, and as soon as the opportunity was given, started to cross."

We see no reason why she should not have looked south—indeed, in each direction—just before stepping on the track; and it appears to us that it was not an exercise of ordinary care to look south, see a train standing, wait a minute, during which time, as counsel say, the freight train proceeding at six miles an hour would have passed a distance of about 500 feet, and then, without looking again, to step immediately in front of the approaching train.

Reversed and remanded.

**Sarah Moulding, Executrix, etc., v. William Wilhartz,
Assignee, etc.**

1. **VOLUNTARY ASSIGNMENTS—*Conditions of Bond Construed.***—An assignee's bond, conditioned that the assignee shall in all things discharge his duties as assignee, and shall obey and carry out any and all orders which the County Court has heretofore entered, or may hereafter enter, is a surety that he shall pay over and account for all moneys which at the time of the execution of the bond he ought to have had in his hands, as well as all that should thereafter come into his hands.

2. **SAME—*Assignee and Sureties Bound by Bond as Executed.***—An assignee and his sureties are bound by the terms of the bond which they execute, and a new bond given under the orders of the court will not be held to have been illegally exacted from the assignee, and binding on neither him nor his sureties, because its terms are in excess of those prescribed by statute.

3. **SAME—*Appeals by Sureties on Assignee's Bonds.***—The sureties on the bond of an assignee have an interest in an order requiring such assignee, who has been removed, to pay an amount therein named to his successor, and are entitled to appeal from such an order.

4. **SAME—*When Orders of Court are Conclusive on Assignee's Sureties.***—The sureties on an assignee's bond are concluded in a collateral proceeding by the finding of the County Court as to the amount unaccounted for that came to the hands of the assignee and which he was ordered to pay over.

Claim in Probate.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed December 28, 1896.

STATEMENT OF THE CASE.

The following extract from the abstract of the record, filed in this court, sufficiently shows the facts in this case concerning which there is no dispute:

Claim filed in the Probate Court by William Wilhartz, assignee of Henry Simon, insolvent, showing that, on the 19th day of November, 1883, Henry Simon executed and delivered a deed of assignment to Jay J. Read, assignee, which was filed in the County Court of Cook County on said date; that Jay J. Read, on the 27th of November, 1883, filed his bond of \$40,000, which was approved by the clerk of

said County Court; that the assignee took possession of the property of Henry Simon; that, on the —— day of ——, 1889, it appearing to the said County Court that said assignee, Jay J. Read, had disposed of more than \$6,000 of the funds of said estate without the order of said County Court, that the sureties upon the bond were insolvent, it was ordered by the County Court that said Jay J. Read, as such assignee, file an additional bond to secure the creditors of said estate, and that thereafter, on the 7th of March, 1889, said Jay J. Read, as such assignee, filed an additional assignee's bond, with Lafayette R. Read, Thomas Moulding and Ossian D. Frary, as sureties; which bond was approved by the clerk of said County Court, copy of which is attached to said claim, marked "Ex. A," and is as follows:

"Know all men by these presents, that we, Jay J. Read, as principal, and Lafayette R. Read, Thomas Moulding and Orson D. Frary, as sureties, of the county of Cook and State of Illinois, are held and firmly bound unto the people of the State of Illinois, for the use of the creditors of Henry Simon, insolvent, in the matter of the estate of Henry Simon, insolvent, now pending in the County Court of Cook County, Illinois, in the penal sum of twenty-five thousand dollars (\$25,000) current money of the United States, which payment well and truly to be made, we and each of us, do hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this seventh day of March, 1889.

The condition of this obligation is such that whereas, the above bounden Jay J. Read, assignee of said Henry Simon, and assignee of the estate of said Henry Simon, now pending in the County Court of Cook County, Illinois, as aforesaid, has disposed of more than \$6,000 of the funds of said estate without the orders and direction of said County Court; and whereas, the creditors of said Henry Simon claim that the sureties upon the bond heretofore filed by said Jay J. Read, as such assignee, in the matter of the estate of said Henry Simon, pending in said County Court of Cook County, are

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insolvent; and, whereas, said County Court of Cook County has ordered said Jay J. Read, as such assignee, to file an additional bond in said estate to secure to the creditors of said estate all moneys and property which come into his hands as such assignee: Now, therefore, if the above bounden Jay J. Read, assignee of the estate of Henry Simon, aforesaid, shall in all things discharge his duties as assignee of the estate of said Henry Simon, as aforesaid, and faithfully execute the trust confided to him, and shall pay and distribute all the moneys and other property which are now in his possession, custody and control, or which shall come into his possession, custody or control as such assignee, among and between the creditors of said Henry Simon, under and pursuant to any and all orders which said County Court of Cook County has heretofore entered in the matter of the estate of said Henry Simon, insolvent, pending in said County Court of Cook County, Illinois, or which may hereafter be entered in said estate, and shall execute, obey and carry out any and all orders and directions of said County Court of Cook County, Illinois, or which may hereafter be entered in said estate, and shall execute, obey and carry out any and all orders and directions of said County Court of Cook County, which have been heretofore entered in the matter of said estate, or which may hereafter be entered therein, then the above obligation to be void, otherwise to remain in full force.

JAY J. READ,	[SEAL.]
LAFAYETTE R. READ,	[SEAL.]
THOMAS MOULDING,	[SEAL.]
OSSIAN D. FRARY,	[SEAL]."

Claimant now shows that on the 15th day of February, 1892, said County Court found that Jay J. Read, as such assignee, had in his possession certain moneys belonging to the estate of said Henry Simon, and directed said Jay J. Read to pay the balance of said money, after payment of solicitor's fees, to the clerk of said County Court; that on the 12th of July, 1892, it appearing to the court that the order concerning the payment of said moneys had not been com-

plied with, it was ordered that said assignee be removed, and claimant, William Wilhartz, was appointed assignee of said estate upon filing his bond in the sum of \$10,000; and it was ordered further, that said Jay J. Read pay and turn over to claimant, as his successor, the sum of \$6,654.29, so found to be due and owing said estate from said Jay J. Read; that claimant qualified as such assignee and filed his assignee's bond in the sum of \$10,000, which was approved by the clerk of said court. Claimant further shows that said Jay J. Read has failed and refused to pay to claimant said sum of \$6,554.29, and still fails and refuses so to do, and that said Thomas Moulding, deceased, is one of the sureties upon the assignee's bond of said Jay J. Read; that by reason of the failure of said Jay J. Read to pay said moneys to the creditors of said Henry Simon, and by reason of his failure to carry out the orders of said County Court, and more particularly the order of said County Court directing the said Jay J. Read to pay claimant the sum of \$6,654.29, the conditions of said bond have been broken, and liability has attached to said Thomas Moulding as one of the sureties upon said assignee bond.

Claimant further shows that there is due and owing claimant from the said Thomas Moulding, deceased, the sum of \$6,654.29, with interest at the rate of five per cent from the 12th of July, 1892, and that claimant has no other claim against said estate.

Verification of claim by William Wilhartz.

MONK & ELLIOTT, attorneys for appellant.

MOSES, PAM & KENNEDY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We do not understand that the truth of the matters set forth in the statement of the claimant is disputed, save the concluding statement as to there being due, etc.

It is urged by the appellant that the defalcation of Jay

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J. Read occurred prior to the execution of the bond in question, and that therefore the sureties upon said bond are not liable.

Not only the recitals in the bond, but the condition thereof, plainly show that the bond was intended to be security for all moneys and property which then was in possession of the assignee, or might come into his possession, and that the assignee, Jay J. Read, should in all things discharge his duties as assignee, pursuant to any and all orders which the County Court of Cook County had theretofore entered or might thereafter enter, and obey and carry out all orders of said County Court which had been theretofore or might thereafter be made.

It is therefore quite immaterial whether said Jay J. Read had, at the time of the making of this bond, actually in his hands, custody and possession, moneys and property of the estate, or whether he had theretofore, in violation of his duty and the orders of the County Court, disposed of the same.

The bond was intended to be and is a surety that he should pay over and account for all moneys which, at the time of the execution of the bond, he ought to have had in his hands as such assignee, as well as all that should thereafter come into his hands.

It is also urged that the bond is not such a one as is prescribed by the statute, and therefore such portions of it as provide for the due execution of orders theretofore made are invalid.

The bond was voluntarily given. The position as assignee which Mr. Read then held was not one to which he had title by virtue of an election by the people, or by appointment, having a definite term of office, and from which he could only be removed by proceedings in the nature of an impeachment. It was the right and the duty of the County Court, if at any time it became satisfied that the bond the assignee had already given was insufficient, to require him to give a new one, and such new bond can not be considered, because its terms are in excess of those prescribed by statute, as having been something illegally ex-

acted from Mr. Read, and consequently something upon which neither he nor his sureties are liable. *Wolfe v. McClure*, 79 Ill. 564; *Todd v. Cowell*, 14 Ill. 72; *Decker v. Judson*, 16 N. Y. 439; *Scofield v. Churchill*, 72 N. Y. 565.

The sureties on the bond are concluded by the findings of the County Court as to the amount unaccounted for that came to the hands of the assignee, and which he was ordered by the County Court to pay over, and the sureties are not entitled to have such matter re-tried. *Housh v. The People*, 66 Ill. 178; *Gillett v. Wiley*, 126 Ill. 310; *Frank v. The People*, 147 Ill. 105; *People v. Seelye*, 146 Ill. 189; *Kallerman v. Estate of Guthrie*, 142 Ill. 357; *Ammons v. The People*, 11 Ill. 6; *Fogarty v. Ream*, 100 Ill. 366.

The order of the County Court made July 12, 1892, commanding Jay J. Read to pay to the claimant the sum of \$6,654.29, was one in which the sureties upon the bond of Read had an interest—were, in the language of the statute, “aggrieved” thereby—and were therefore entitled to appeal therefrom. *Weer v. Gand*, 88 Ill. 490.

Appellant can not, in this proceeding, litigate a matter upon which there was an order of the County Court from which he could have appealed.

Counsel for appellant urge that the assignee having paid a judgment described as the Kusworm judgment, without an order of court therefor, and not being allowed the amount so paid, and it being admitted that such judgment was a proper claim to the extent of \$1,500, he, the assignee, is entitled to be allowed, as against the estate, a claim to the extent of \$1,500; that is to say, that as, but for the payment made by him, there would have existed against the estate a claim for \$1,500, which he has disposed of, he is entitled to an allowance to the extent of whatever dividend would have been due upon such claim for \$1,500.

We think counsel for appellant is right as to this, and upon an examination of the abstract of record, we find that such allowance was made, the finding being that after crediting the assignee with this \$1,500, he owed the amount which the County Court ordered him to pay.

The judgment of the Circuit Court is therefore affirmed.

High Court Catholic Order of Foresters v. Minnie Malloy.

1. **FRATERNAL BENEFIT SOCIETIES—Construction of By-Laws.**—Amendments to the by-laws of a fraternal benefit society, restricting the exercise of rights possessed by its members, should be reasonably plain, and if ambiguous, will be construed favorably to the party claiming rights granted by the by-laws as they were before amended.

Assumpsit, on an insurance certificate. Appeal from the Circuit Court, Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Justice Waterman dissenting. Opinion filed January 7, 1897.

E. S. CUMMINGS, attorney for appellant.

CARPENTER BROS., attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 6, 1889, the appellant, which is a fraternal benefit society, issued to James Gorman an "endowment certificate," by which it promised to pay to his wife, Maggie, \$1,000 upon his death, upon condition, among others, that he complied with the laws and regulations then governing the order, "or that might be thereafter enacted."

At that time the "laws" were such that in the event of the death of Maggie before the death of James, which event did happen, the money ought to be paid to relatives named "if he (James) shall have made no other or further disposition thereof."

Such "laws" also gave him the privilege to surrender the certificate at any time, and take a new one payable to some other person, of certain classes.

The appellee is within those classes.

Before his death, James made his will, giving the appellee, his sister, what might come to his estate from the appellant.

After the certificate was issued the appellant enacted a by-law as follows:

"No entry shall be made in any application or endow-

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ment certificate, or otherwise, permitting the designation by or ascertainment by reference to, any will of the person or persons, trustees or beneficiaries, to whom any endowment shall be payable, or the amount or share of any benefit. No will shall be permitted to control the appointment or distribution of or rights of any person to any endowment payable by this order."

The validity of this by-law, we do not think admits of question; the effect of it is the subject of inquiry.

The certificate implied that James might, in the event of the death of his wife during his life, make "other or further disposition" of the sum payable under the certificate.

The privilege could not be exercised under the provision that he might surrender the certificate, and take a new one payable to some other person, for such action would not be "other or further disposition" of the sum payable under the original certificate, but an abandonment of that certificate.

The privilege of "other or further disposition" was to be exercised only in the event of the death of Maggie while James lived, and it was the money to which she would have been entitled, had he died first, of which the "other or further disposition" could be made.

If, therefore, the by-law quoted had not been enacted, the right of the appellee would be clear.

Now, the first sentence of that by-law does not refer to the will of the person who took out the certificate; but to the will of some person who is to take a benefit under it.

The second sentence is ambiguous. Broken up into clauses, it may be read: "No will shall be permitted to control the appointment of any person to any endowment. No will shall be permitted to control the distribution of any endowment. No will shall be permitted to control the rights of any person to any endowment."

But as the right to make "other or further disposition," if Maggie died, was reserved to James, and no mode of its exercise named, he might exercise it in any way not in conflict with the laws of the appellant, or with general law.

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Any law of the appellant restricting the exercise of the right, should be reasonably plain, not requiring the abstruse reasoning of a doctor of laws to arrive at its meaning. Upon the maxim *noscitur a sociis*, the second sentence refers only to such wills as the first sentence does.

References to many authorities are in *City of Cairo v. Coleman*, 53 Ill. App. 680; *Broom*, L. M. 588.

In our judgment the will of James was a valid disposition of the sum payable under the certificate, and entitled the appellee to the money. That he intended that the words he used in his will should give the money to her, can not be doubted, and in construing the will, his intention is the primary consideration.

The judgment is affirmed.

MR. JUSTICE WATERMAN, dissenting.

Sec. 3 of Art. 12 is as follows: "A member may at any time, when in good standing, surrender his endowment certificate, and a new certificate shall be thereafter issued payable to such beneficiary or beneficiaries as such member may direct, in accordance with the laws of the order, upon the payment of a fee of fifty cents. Said surrender and direction must be made in writing, signed by the member and forwarded under seal of the subordinate court with the endowment certificate to the high secretary."

The member, in taking his certificate, agrees to be bound by the by-laws then in force and such as might thereafter be adopted.

The following by-law was thereafter adopted:

"No entry shall be made in any application or endowment certificate, or otherwise, permitting the designation by, or ascertainment by reference to, any will of the person or persons, trustees or beneficiaries, to whom any endowment shall be payable, or the amount or share of any benefit. No will shall be permitted to control the appointment or distribution of or rights of any person to any endowment payable by this order."

It is manifest that it was intended by the by-law last set

forth, to put at rest all claim of right to designate by will a beneficiary.

I see no reason why the plain meaning of the by-law should not be enforced.

The member, by his will, instead of designating appellee as the beneficiary, willed to her "all the remainder of his personal estate, including anything that may come to his estate by reason of his insurance," etc.

Nothing goes to his estate by reason of the insurance.

Wills are to be construed according to the intention of the testator, and it may, perhaps, be fairly said that the deceased thought that the insurance money would go to his estate, and so willed it to his sister instead of, in a proper manner, exercising the power of appointment which he had, and which the new by-law forbade the exercise of by will.

The mode of changing the beneficiary specified in the contract must be substantially followed. Niblack on Benefit Societies, Sec. 218; *Mellows v. Mellows*, 61 N. H. 137; *Ireland v. Ireland*, 42 Hun, 212; *Wendt v. Iowa Legion*, 72 Iowa, 682.

Frank A. Dunning v. Charles S. Young.

1. DAMAGES—*On Dissolution of an Injunction—Solicitor's Fees.*—The only damages that can be allowed on the dissolution of an injunction are such as result from an improper suing out of the same, and the allowance of solicitor's fees must be confined to services rendered on the motion to dissolve.

Motion for Damages, on dissolution of an injunction. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Superior Court of Cook County, denying appellant an allowance of damages upon the dissolution of an injunction wrongfully sued out.

Dunning v. Young.

On May 15, 1896, appellee filed his bill of complaint setting up that the license to manufacture and sell patented lamp reflectors, procured by appellant from the owner of the patent, should have been for the joint benefit of appellee and appellant, but that appellant wrongfully took it to himself and claims sole ownership thereof. The bill asked that appellant be decreed to hold such license as trustee for them both; for an injunction restraining him from assigning or disposing of it, and for general relief. And called for an answer under oath.

On the 16th an injunction as prayed issued without notice to appellant.

On the 21st the sworn answer of appellant was filed denying that the license was, or should have been, taken for the joint benefit of appellee and himself, and claiming that appellee had no interest therein.

On the 23d appellant's motion to dissolve the injunction was called, and ordered placed on the contested motion calendar for the following Monday.

On the 25th this motion was heard on bill, answer and arguments, and was denied, and the cause set down for a hearing on the merits. Appellant excepted to the order of the court denying his motion, and prayed an appeal therefrom to this court, which prayer was also denied.

On the 29th, the cause being called for a hearing, appellant renewed his motion to dissolve the injunction upon his sworn answer.

The court again denied the motion, and directed the hearing proceeded with.

The only evidence offered on the hearing was the testimony of appellee, after hearing which the court ordered the injunction dissolved and gave appellant leave to file his suggestion of damages in ten days.

The suggestion of damages was filed and, thereafter, on June 15th, came on for a hearing and was disposed of, the court ruling that "the hearing of testimony on said suggestions of damages and on said motion (for an allowance of damages) would not be proper, as the subject-matter of said

motion was covered by the decision of the Appellate Court in *Gooch v. Furman*, 62 Ill. App. 340." The motion was denied, and the bill was dismissed.

BRECKENRIDGE & RASMUSSEN, attorneys for appellant.

JAMES H. TELLER, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The only damages that can be allowed on the dissolution of an injunction are such as result from an improper suing out of the same; and the allowance for solicitors' fees must be confined to service rendered on the motion to dissolve. *Elder et al. v. Sabin et al.*, 66 Ill. 126; *Lichtenstadt v. Fleisher*, 24 Ill. App. 92; *Weaver, Adm'r, v. Fries*, 85 Ill. 349; *Blair v. Reading et al.*, 99 Ill. 600; *Moriarty v. Galt*, 125 Ill. 417.

The allowance of fees rests, to a considerable degree, in the discretion of the chancellor before whom the litigation has proceeded, and the discrimination made by him, as it can best be, between the services rendered on the motion to dissolve and those which were for the trial of the case, is a matter which presents to a reviewing court a difficult question.

So, too, whether anything should be allowed on a motion to dissolve when no dissolution was had until after hearing, is a thing with which the chancellor before whom the proceedings were, has an opportunity for coming to a correct conclusion which an appellate tribunal does not possess. *Lichtenstadt v. Fleisher*, 24 Ill. App. 92.

In the present case the motion to dissolve was denied, and only after hearing upon the merits was the injunction dissolved.

The Superior Court refused to allow the claim for damages. We can not say that it erred in so doing.

From the knowledge the chancellor had of the proceedings, he seems to have concluded that damages ought not to

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be allowed, and consequently stated that he would not hear evidence.

Unless upon the record we can say that appellant was entitled to damages, we can not find that it was error for the court to do as it did.

Perceiving no error, the order of the Superior Court is affirmed.

J. Irving Pearce v. City of Chicago.

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176	152

1. EMINENT DOMAIN—*Disposition of Money Paid into Court.*—A city had certain land condemned for use as a street, but constructed a sewer through it and deposited in court part of the compensation awarded to the owner. At a later date the condemnation proceedings were dismissed on petition of the owner on account of the non-payment of the balance of the compensation and the street was not opened. Both parties petitioned for the money in the hands of the court. *Held*, that the construction of the sewer gave the owner of the land no claim on the money in court, and that it should be paid back to the city.

Condemnation Proceedings.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

MANN, HAYES & MILLER, attorneys for appellant.

JOHN D. ADAIR, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The facts of this case, when compressed, are that in January, 1892, under eminent domain proceedings, land of the appellant was condemned for the purpose of opening a street through it, and \$20,000 awarded as the compensation.

June 7, 1895, the court, on motion of the appellant, entered an order that the city pay within ten days, or all proceedings be dismissed, and July 2, 1895, payment not having been made, ordered "that said proceedings be, and the same are hereby dismissed." That order ended those proceedings. Sec. 167, Ch. 24, R. S.

May 17, 1895, the city paid into court, under an order of the court, \$4,500 as the difference between the amount so awarded as compensation, and the amount assessed upon the same land for benefits, and by another order of the same day was authorized to take possession of the land.

May 27, 1895, on motion of the appellant the orders of May 17th were vacated.

April 9, 1896, upon petition by both parties for the \$4,500, the court ordered that it be paid to the city. From that order this appeal is taken.

The record does not show, nor does the brief of the appellant contend, that the street has ever been opened; but it is contended that as the city, in the summer of 1892, constructed a sewer, six feet in diameter, along the center of the proposed street, the appellant should have the money in dispute.

There is no necessary connection between a street and a sewer.

In a flat city like Chicago sewers do run in the streets, but that is engineering, not law. What remedy the appellant may be entitled to because of the sewer, is not in this case.

The judgment of the Superior Court is affirmed.

MR. JUSTICE WATERMAN :

The proceedings having been dismissed at the instance of appellant, I do not see how either he or the city is bound thereby. Appellant can not be compelled to receive as his full compensation for damage by him sustained, the amount awarded in the condemnation proceeding, nor can the city be made to pay such sum. Appellant's land has been entered upon and is now unlawfully occupied by the city; for this the law affords him adequate remedies, as to which he is not in any way bound or restricted by the proceeding heretofore begun and at his request dismissed.

Genesee Fruit Co. v. Barrett.

**Genesee Fruit Company v. William H. Barrett and
Charles R. Barrett, Copartners as Barrett
& Barrett.**

1. **RESCISSION—*For Failure to Pay.***—A refusal to pay in accordance with the terms of an agreement, even though the amount withheld be small, is a breach which indicates that the one who is guilty of it, does not intend to be bound by the contract, and gives the other party a right to rescind it.

Assumpsit, for breach of contract. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. . Reversed and remanded. Opinion filed January 7, 1897.

VICTOR ELTING, attorney for appellant; J. S. HARLAN, of counsel.

HOLLETT & TINSMAN, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of \$1,684.95, recovered by the appellees in a suit brought against the appellant for a breach of contract.

The appellant corporation is engaged in the manufacture and sale of cider and vinegar, with mills in the States of New York and Michigan, and the appellees are jobbers in such products, in Chicago.

Appellant's treasurer called at the place of business of appellees in Chicago in December, 1891, and, after some preliminaries, executed to appellees the following memorandum of an agreement to sell them forty car loads of cider and vinegar:

“December 21, 1891.

We to-day sold Barrett & B. 15 cars juice $6\frac{1}{2}$; 20 cars vinegar $6\frac{1}{2}$, 4 per cent; 5 cars hard cider $6\frac{1}{2}$, in their packages F. O. B. Lansing, to be taken as wanted previous to September 1, 1892, and it is understood that we shall not be

responsible for fermentation of juice if not ordered out before April 1, 1892.

GENESEE FRUIT CO.,
JOHN C. MOTT, Treasurer."

"Juice" is the trade name for sweet cider, and "packages" is the trade name for barrels, etc. The figures "6 $\frac{1}{4}$ " and "6 $\frac{1}{2}$," mean that many cents per gallon; "4 per cent" indicates the strength of the vinegar, and "Lansing," in Michigan, is the place at which the deliveries free on board cars were to be made; and a car, or car load, is understood by the trade as meaning sixty barrels of an average of forty-seven gallons each, or about 2,800 gallons.

The fifteen car loads of juice were delivered by April 5, 1892, and were paid for, except the sum of \$7.94, which appellee deducted because of leakage or fermentation in the last car load delivered on April 5, 1892.

None of the vinegar or hard cider, except one car load of the latter, in March, 1892, was ever delivered. Concerning that one car load, the appellees claimed it was not equal in quality to what it should have been, and refused to accept it under the contract. They then obtained authority from appellant to sell it for its account at an authorized price, and afterward falsely pretended, by an account rendered, that they had so sold it, although in fact they did not sell it, but kept it themselves.

After the shipments spoken of, ending April 5th, no more of the contracted goods were ordered by the appellees until on August 25, 1892, when they sent a telegram to appellant as follows: "Ship hard cider and vinegar bought as per contract."

That telegram had been preceded by one from appellant to appellees on August 13th, requesting them to remit the balance of \$7.94 due on the juice shipped April 5th, and asking for instructions about shipping the remaining twenty-five car loads of vinegar and hard cider, and refusing to give attention to other orders by appellees until such requests were complied with; and was followed by a second telegram from appellees, dated September 1st, inquiring

if the shipment had been commenced. To this last telegram appellant responded, saying that shipments were not being made, and referred appellees to the telegram of August 13th, and to a letter of May 7th, from appellant to appellees.

We will not reproduce that letter of May 7th, nor other correspondence between the parties. It is enough to say that an examination of it shows a persistent demand by appellant upon the appellees for the \$7.94 which appellees had deducted from the amount due for the last car load of juice that was shipped on April 5th, and a refusal or evasion by the appellees of such demand.

The claim made by the appellees concerning their right to make such deduction was stated in their letter of May 5, 1892, to be because "when this car arrived, this car was fermenting badly and nearly all the packages were sprung and leaking more or less, so much so that we were obliged to dump the whole" of it into their vinegar stock, and such claim was never differently asserted until suit was begun.

This statement can mean only that the claimed loss was due to fermentation, and must be given higher credit than can be accorded to the testimony of one of the appellees given at the trial, that it was because of shortage in the number of gallons. The first claim was made at the inception of the controversy, while recollection was fresh, and was before the controversy had ripened into the heat of a lawsuit.

It will be seen by inspection of the memorandum of contract, that appellant should "not be responsible for fermentation of juice if not ordered out before April 1, 1892." There is no claim made that appellees "ordered out" the car load that was shipped April 5th before April 1st, and it must follow that appellees withheld payment of the balance that was due from them for a cause not open to them.

The special finding by the jury, that the deduction was made because of "shortage," is based upon nothing but the testimony of one of the appellees, and is clearly against the weight of the evidence. And, besides, the deliveries were

to be made on board cars at Lansing, and there was no evidence that the full quantity was not there delivered and in good condition.

The withholding of this amount, though small, after repeated demands for it, constituted a breach of contract by the appellees, and gave the appellant the right, if it so elect, to decline to further proceed on its part. As early as August 13th, appellant explicitly informed the appellees, by telegram, that when they should remit the balance of \$7.94, their further orders would receive attention; and the implication was as strong as courteous conduct between business men requires, that until the remittance was made, further orders would not be given any attention. Therefore, when, on August 25th, the appellees ordered the remaining twenty-five car loads to be shipped, the appellant was justified in refusing attention to the order.

But it is urged by appellees that the amount was insignificant, and the withholding of it did not constitute a material breach of the contract; and the trial judge seems to have entertained a like view, for he modified an instruction, asked by appellant, to the effect that appellees could not recover unless they proved, among other things, that they had not refused to pay, according to the contract, for goods delivered, by adding to the instruction, "or if they had refused to pay any sum, that the same was insignificant in amount," etc. By way of illustration, rather than of argument, it might be asked, why, if the amount be too insignificant to constitute a material breach of the contract, by a refusal to pay it, was it not too insignificant for the appellees to insist upon withholding it?

The instruction as modified was equivalent to telling the jury that as a matter of law, the withholding of \$7.94 from a bill of about five hundred dollars, owed by one to another, was an insignificant matter for which the person from whom it was withheld was without redress. Such is not the law, and a verdict secured upon an hypothesis that such is the law, is erroneous.

The question should not have been treated as one of

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amount. The question, in such connection, was whether or not the appellees had kept the contract on their part. They had, by the acceptance of the contract, agreed to pay for goods contracted to be sold to them. Had they done so? If not, then they should not be entitled to recover for a refusal by the other contracting party to deliver more goods. If they might take seven dollars and ninety-four cents out of the contract price for one car load of goods, then they could, by the same right, take \$317.60 out of the price for the whole forty car loads called for by the contract.

This court has, in *Geary v. Bangs*, 37 Ill. App. 301, laid down the rule to be as follows:

“The true ground is that a refusal to pay in accordance with the terms of the agreement is a breach which indicates that the one who is guilty of it does not intend to be bound by the contract, and therefore the other party may rescind it.” See, also, *The Hess Co. v. Dawson*, 149 Ill. 138.

In *Withers v. Reynolds*, 2 Barn. & Adol. 882, it was held that under a contract to deliver three loads of straw at thirty-three shillings a load, to be paid as the loads were delivered, the refusal by Withers to pay for one load, for which he was behind, indicated that he did not intend to be bound by the contract and justified Reynolds in refusing to make a further delivery.

Counsel for appellees attempt to distinguish this case from those cited, on the ground that they were cases where payment for deliveries made was a condition precedent to a continuance of delivery, or of further performance, while this, they contend, was not. The written memorandum required the deliveries to be made “as wanted,” prior to September 1, 1892, and the construction that the parties put upon it by their conduct, by appellees paying for all goods that were ordered, when received, (except the deduction referred to,) will be the construction that we will give to the contract, viz., that each shipment was to be paid for within, at least, a reasonable time after receipt, and was therefore a condition precedent to future shipments.

The views we have expressed render it immaterial to dis-

cuss the question concerning the modification of the contract by a further and subsequent agreement between the parties, to the effect that in case appellees did not provide as many packages at Lansing as would be required to hold all the vinegar and hard cider, the appellant would furnish them; and the other question whether the provision of the contract that the goods should be "taken" before September 1st, means that they should be shipped before that date, or merely ordered, and if the former, whether ordering, on August 25th, so much as twenty-five car loads, equal to about fifteen hundred barrels, to be put up and shipped in six days, was a reasonable notice in such regard.

Upon another trial, if one shall be had, all such questions are likely to be properly treated.

The judgment of the Circuit Court is reversed and the cause remanded.

Solomon Loewenstein v. Leland S. Rapp and Lillian M. Rapp.

1. **EQUITY PLEADING—References to Instrument Relied Upon.**—If a plaintiff, by his bill, describes and gives the general purport of any instrument under which he claims, and refers to such instrument in support of his claim, the effect of such reference is to make the whole instrument referred to, when produced, a part of the record.

2. **EQUITY PRACTICE—Decree for Taxes Paid Pendente Lite.**—In a suit to foreclose a mortgage, it is proper to allow the complainants for money advanced for the payment of taxes, after the filing of the bill under the prayer for general relief; the contingencies which would justify such payment having been set forth in the bill.

3. **VARIANCE—In Equity.**—In equity, relief will not be denied because of mere variance, unless the case stated and the case found are so materially variant as to prevent a decree in favor of the complainant.

Foreclosure of Mortgage.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This suit was to foreclose a trust deed upon certain premises in Cook county, Illinois.

Loewenstein v. Rapp.

By his trust deed, dated February 21, 1894, appellant conveyed the premises in question to Albert H. Adams, as trustee, which trust deed recited an indebtedness of \$3,750, evidenced by three notes, each for \$1,250.

In the decree of foreclosure, the lower court has included two items to which appellant takes exception, viz., an item of \$67.92 for taxes and assessments upon the premises, paid *vendente lite* by appellee; second, \$100 for solicitor's fees in the foreclosure suit. Objection to the allowance of these items was made by the appellant before the master, and renewed by exceptions filed to his report, and appellant now submits to the consideration of this court the propriety of the decree in these regards.

SAMUEL J. LUMBARD, attorney for appellant.

SOHINTZ & IVES, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The provisions of the trust deed, regarding payment of taxes and solicitors' fees, are as follows:

"To obtain a decree for the sale and conveyance of the whole or any part of said premises, for the purpose herein specified, * * * and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and one hundred dollars attorneys' and solicitors' fees, and also all other expenses of this trust, including all moneys advanced for insurances, taxes and other liens or assessments, with interest thereon at seven per cent per annum, then to pay the principal of said notes, whether due and payable by the terms thereof, or the option of the legal holder thereof, and interest due on said notes up to the time of such sale, rendering the overplus, if any, unto the said party of the second part.

It is agreed that said grantor shall pay all costs and

attorneys' fees incurred or paid by said grantee, or the holder or holders of said notes, in any suit in which either of them may be plaintiff or defendant, by reason of being a party to this trust deed, or a holder of said notes, and that the same shall be a lien upon said premises, and may be included in any decree ordering the sale of said premises, and taken out of the proceeds of any sale thereof."

The taxes were not paid until they had become a lien upon the premises, the removal of which lien was within the power of appellees for the protection of their security. *Brown v. Miner*, 21 Ill. App. 60; same case, 128 Ill. 148.

A default which had not occurred—failure to pay taxes—could not be alleged in the bill. When such default happened, it was not necessary that a supplemental bill, setting this up, should be filed. *Brown v. Miner*, 21 Ill. App. 60.

The allegations of the bill regarding the trust deed were sufficient to make the trust deed a part of the bill, for the purpose of permitting appellees to make proof of payment of taxes *pendente lite*.

In equity, relief will not be denied, because of mere variance, unless the case stated and the case found are so materially variant as to prevent a decree in favor of the complainant. 1 Barton's Chy. Pr. 260.

In stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself, in some such words as the following, namely: "as by the said indenture, when produced, will appear." The effect of such reference is to make the whole instrument referred to part of the record. The effect of referring to it is to enable the plaintiff to rely upon every part of the instrument, and to prevent his being precluded from availing himself, at the hearing, of any portion, either of its recital or operative part, which may not be inserted in the bill. Thus it seems that a plaintiff may, by his bill, state simply the date and general purport of any particular deed or instrument under which he claims, and that such statement, provided it is accompanied by a reference to the deed itself, will be sufficient. 1 Daniell's Ch. Pl. & Pr. (6th Am. Ed.) p. 369; *Swetland v. Swetland*, 3 Mich. 482.

West Chicago Street R. Co. v. Dudzik.

The solicitor's fee allowed was shown to be reasonable, and was properly included in the decree. *Telford v. Garrels*, 132 Ill. 555.

In the present case, the trust deed directly authorizes such inclusion.

The payment of the taxes was for the benefit of appellant, and the decree for solicitor's fees only what he stipulated for. The decree of the Superior Court is affirmed.

West Chicago St. R. Co. v. John Dudzik.

1. ORDINARY CARE—*Getting On or Off a Moving Car.*—To get on or off a moving street car is not necessarily a failure to exercise ordinary care.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

STATEMENT OF THE CASE.

This was an action brought by John Dudzik to recover damages for personal injuries, alleged to have been received through the negligence of the West Chicago Street Railroad Company. The declaration, which consists of two counts, charges:

First. That the defendant, after having stopped its car for the plaintiff to board, started while the plaintiff was attempting to do so, thereby throwing him to the ground.

Second. That the defendant so negligently handled its train while the plaintiff was attempting to board it, that he was thereby thrown to the ground.

The evidence shows that the accident occurred while the plaintiff was trying to board a down town train, on the northwest crossing of Tell Court and Milwaukee avenue. The evidence further shows that at this point is the throw-off, where the grip is thrown off in order to let go of the rope, and a little further to the southeast is the pick-up,

where the grip takes hold of the cable which takes the cars down town. This accident occurred at this place, the plaintiff having attempted to board the train just at the time, or immediately after it had picked up the new cable, and the accident was caused by the increased momentum of the train by the application of the grip to the new rope.

At the trial, the jury returned a verdict in favor of the plaintiff, and assessed his damages at \$482.

Judgment having been entered on the verdict, the defendant appeals.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JOHN C. TRAINOR, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The court and jury, before whom this cause was tried, having determined that appellee was, while in the exercise of ordinary care, injured by the negligence of appellant, this court can not set aside such finding upon the evidence, unless we can say that it is opposed to the clear preponderance thereof.

Appellee was hurt while endeavoring to take passage upon one of appellant's cars. The car was then moving slowly. To get on or off a moving street car is not necessarily a failure to exercise ordinary care. *North Chicago St. Ry. Co. v. Wrixon*, 51 Ill. App. 307.

There is nothing tending to show that the jury was actuated by passion or prejudice.

The judgment of the Circuit Court is therefore affirmed.

Chicago & W. I. R. R. Co. v. John Surowieski.

1. GROSS NEGLIGENCE—*In Case of Injury to Trespasser.*--In a suit against a railroad company for personal injuries, it appeared that a train belonging to the company was stopped upon the railroad track so as to

C. & W. I. R. R. Co. v. Surowieski.

block a public street; the plaintiff attempted to climb between two cars, the train was started while he was thus engaged, and he was injured. *Held*, that unless the defendant had notice at the time the cars were moved, that the plaintiff was in a position where such movement would be fraught with great danger to him, its conduct can not be said to have been wanton, reckless or gross negligence.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed January 7, 1897.

EDGAR A. BANCROFT, attorney for appellant.

CASE & HOGAN and B. W. ANDERSON, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought to recover damages for personal injury resulting to the plaintiff from, as charged in the declaration, "the willful, wanton, reckless and negligent act of the servants of the appellant, in suddenly and without notice, starting and putting in motion one of its freight trains, between two cars of which the plaintiff was attempting to cross."

The evidence upon behalf of the plaintiff tended to show that on the evening of January 19, 1887, he, a minor, being on his way home from his place of employment, was delayed by the blocking of Commercial avenue by the appellant's train, which was standing upon the track across that avenue, which track the plaintiff had to cross in order to reach his home; that he waited about twenty minutes for the train to pass on, and finding that it did not move, attempted to cross over between the cars. At this time it was a little after dark, the engine of the train not being in sight, nor could either end of the train be seen from Commercial avenue. About eighty people on Commercial avenue were waiting for the train to move from the crossing, and some of these, while the street was thus blocked, began to cross it under and between the cars. The plaintiff attempted to do so, and while in the act of cross-

ing, with his foot upon one of the bumpers of a freight car, the train was started in response to a signal given by a trainman, without any signal having been given by ringing a bell or by blowing a whistle. The trainman, when he gave the signal, was at the depot near where people were then crossing under and between the cars. As plaintiff stepped upon the bumper his foot slipped and was caught between two of the freight cars and badly injured.

The judge before whom the cause was tried, in overruling a motion for a new trial, stated that "in his judgment the finding of the jury was contrary to the weight of the evidence, and that if the matter had been submitted for finding to the court without a jury, the court would, upon the evidence heard, have found for the defendant, and that the court was not satisfied with the verdict of the jury, but still was not certain that it ought to be set aside upon the court's opinion as to the weight of the evidence; and further that he desired his opinion of the evidence embodied in the bill of exceptions, so that on appeal the Appellate Court might not think that the verdict was approved by the trial court; that in the opinion of the court the evidence introduced was in favor of the defendant, but that the court was not clear that it ought to disturb the action of the jury."

That the plaintiff was very negligent as regards care for his own safety, and was, in jumping upon appellant's car, a trespasser, can not be disputed. It is, however, insisted by appellee that the conduct of appellant in starting its train as it did was wanton, willful and reckless, and that therefore, under the evidence in this case, the plaintiff is entitled to recover.

Properly speaking, there is no such thing as willful negligence. By negligence is meant an omission to do something which a party ought to do; in the expression is involved a negation of willfulness. A willful act is one which is intentionally done, with a purpose and design to do. A negligent act is the result of an omission only. In the present case, the appellant willfully moved its train,

but there is no evidence tending to show that either it or any of its servants willfully injured the plaintiff; and it is for the injury to the plaintiff that this action is brought, although true it is that the suit is based upon a willful moving of the train.

In an action for personal injury, there is not much, if any, difference between negligence which may be said to amount to wantonness or to recklessness. By either is meant such a disregard of duty as evinces an utter indifference to duty or the rights of others, which is sometimes termed gross negligence. *C., C., C. & St. Louis Ry. Co. v. Tart*, 12 Cir. Ct. App. 618; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; *Lake Shore v. Pinchin*, 13 N. E. R. 677; *Lewis v. B. & O. R. R. Co.*, 38 Md. 588; *C., B. & Q. R. R. Co. v. Sykes*, 96 Ill. 162; *C. & N. W. Ry. Co. v. Coss*, 73 Ill. 394; *C., B. & Q. R. R. Co. v. Dewey*, 26 Ill. 255; 2 *Rorer on Railroads*, p. 1130; *Hudson v. Wabash Ry. Co.*, 15 S. W. R. 15.

In the present case there is no evidence that the conductor of the train, when he gave the signal to start, knew that appellee or any one else was upon or endeavoring to pass through the train. It appears that the trainmen desired to cut the train in two, so as to leave the crossing clear, and in order to do this, backed the cars for two or three feet, so that it might be uncoupled. The conductor who gave the signal was on the side of the train opposite to that which the plaintiff approached as he attempted to pass through.

Plaintiff attempted to pass and was caught between a box car and a car loaded with coal.

The conductor who gave the signal testifies that he did not see anybody until he cut the train, and there is no evidence tending to contradict his evidence in this regard, although there is evidence showing that if the servants of appellant had gone down to the crossing and there looked, they would have seen the plaintiff and others attempting to pass between the cars.

Unless appellant had notice at the time the signal was given to move the cars, that the plaintiff was in a position where such movement would be fraught with great danger

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to him, its conduct can not be said to have been wanton, reckless or gross negligence.

It not appearing that appellant had such notice, the judgment of the Circuit Court is reversed and the cause remanded.

Chicago House Wrecking Co. v. James H. Rice Company.

1. **CONTRACTS**—*When Proof of Readiness to Perform Unnecessary in Suit for Breach.*—A notice by one party to a contract that he will not perform it, dispenses with the necessity of proof of readiness to perform by the other party, in a suit by him for breach of the contract.

2. **INSTRUCTIONS**—*When Error in, Not Ground for Reversal.*—The fact that an improper instruction was given is not ground for the reversal of a judgment if it appear that the jury did not follow it.

Assumpsit, on special and common counts. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed January 7, 1897.

SIMEON E. BAUM, attorney for appellant.

SMOOT & EYER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The appellee sued the appellant for not delivering the glass upon a contract as follows :

“ Old buildings torn down.	Buildings bought and sold.
Old building material for sale.	Fire wrecks cleaned up.

CHICAGO HOUSE WRECKING COMPANY.

Second-hand building material.

Office and yards : 3005 to 3007 South Halsted street.

Telephone, Yards 827.

CHICAGO, December 4, 1893.

J. H. Rice & Co., City.

GENTS: We accept your offer of \$1,600 (sixteen hundred dollars) for all plate-glass in Brazil building at World's Fair.

Respectfully,

CHICAGO HOUSE WRECKING COMPANY,

F. HARRIS.

Chicago House Wrecking Co. v. James H. Rice Co.

Will notify you when we get possession so that you can take the glass out."

The appellant made the defense that the paper was not delivered as a present contract, but only to be a contract if the appellant got, as it did not, the building; a good defense, if proved. *Counselman v. Collins*, 35 Ill. App. 68.

But, upon conflicting testimony, the verdict of the jury discredits that defense.

The note below the signature to the paper, is not a condition. If it had not been appended, perhaps it would have been the duty of the appellee to take notice of when the glass might be taken out; but the body of the paper is an absolute undertaking that such time should come, and the note is an undertaking to notify the appellee when it does come.

The common and often approved form of instructions is, "if the jury believe from the evidence," while one of the instructions for the appellee was "if it should appear from the evidence." A brief making a point on such a difference, and on a supposed difference between market price and market value, undervalues whatever of merit may be in it.

On the motion for a new trial, the appellant truly urged that there was no proof that the appellee was ready and willing to pay; an objection with which we might have had much difficulty but for the decision in *Wolf v. Willits*, 35 Ill. 88; that instruction 7 on page 95 correctly stated the law; that instruction being, in effect, that a notice by one party that he will not perform, dispenses with proof of readiness by the other.

The valid objection to an instruction given, that the measure of damages included interest, is removed by the fact that the jury did not follow it.

The defense first alluded to not being successful, there is really nothing in the case to contest, and the judgment is affirmed.

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Ex. C. M.

